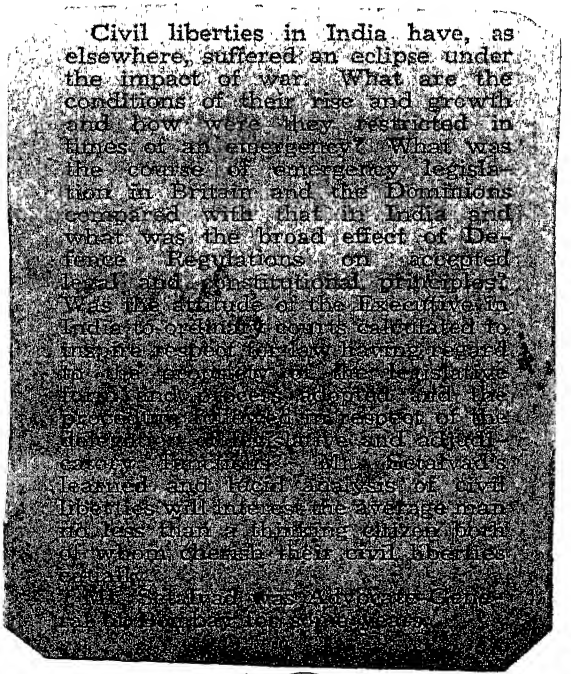
WAR AND CIVIL LIBERTIES

BY

M. C. SETALVAD



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PREFACE

The preservation of Civil liberties during times of emergency such as of war is a matter of great importance to the average citizen. The purpose of the writer in examining how these liberties suffered in war time and the efforts made by the citizen and the Courts of Law to preserve them is to assist in the solution of this problem.

Since this monograph went to the press, events have happened which, it is hoped, will enable India to attain very soon the status of a National Democratic State. Whatever the Constitution which may be ultimately evolved by the Constituent Assembly, it will certainly mean the end of foreign domination and the rule of the bureaucracy. The Indian citizen of the future will not therefore have to pass through the travail of a dual crisis-external and internal-during a time of emergency.

The proposals of the Cabinet Mission envisage Fundamental Rights being guaranteed to the citizen by being incorporated into the future constitution of the country. Having regard to the nature of the division of functions between the Union and the Provinces, it appears that these rights will have to be embodied in the constitutions of the Union as well as of the Provinces. The Indian Union and Provincial Constitutions, will, it is hoped, like those of the United States and Ireland, be the bulwark of the liberties of the citizen.

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Bombay
15*th September*, 1946

CONTENTS

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I. INTRODUCTORY

It was said by Lord Atkin, that 'amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.'[1] That may be true. But during the time of war changes in the laws have been so far-reaching and the laws have been speaking with such a multitude of voices that the ordinary citizen has found himself in a state of complete bewilderment. The operation of these war-time laws has drastically affected the daily life of the citizen in all its aspects. The ordinary man buying his food and cloth, the agriculturist storing or marketing his grain, the trader buying and selling his wares, the factory owner buying his raw material and selling his product, the editor writing for his paper, the public worker and speaker addressing his meetings, and even the man of religion preaching his sermon—all have experienced the rigour of these war-time laws. And perhaps what bears more heavily on the average citizen than the multitude of laws which have invaded his normal activities is the multiplication of law-making and law-enforcing authorities; some of them executive and administrative bodies and officials, whose orders and decisions are in a large number of cases arrived at in an arbitrary manner and are final and without appeal to a judicial authority. In the result the average citizen finds that the freedom enjoyed by him in normal times of peace has in some cases been wholly lost and in others greatly curtailed.

It is fully recognized that in a time of grave national crisis, the State and its interests must be supreme and that all the cherished notions of individual liberty must give way to the paramount need and exigencies of the State. It is also recognized that modern war is a total war, that it calls for the strenuous and unceasing help and co-operation of the

1. *Liversidge* v. *Sir John Anderson,* (1942) A.C. at p. 244.

civilian as well as the soldier, and that in such a war civilian life and its manifold activities must be subjected to regimentation and regulation in the wider interests of the safety of the State.

But while conceding this the citizen accustomed to a free existence under the protection of the law is entitled to inquire whether invasion of his civil liberties in times of war need have been so drastic and extensive as he has experienced. He may well ask whether the extensive delegation and sub-delegation of the law-making power by the duly constituted legislature to executive and administrative bodies and officers which he has witnessed in times of war is justified. And he may question the necessity and the propriety of the entrustment of large judicial and semi-judicial functions to executive and administrative bodies and officers to be exercised by them arbitrarily and without recourse to the semblance of a judicial procedure and without the safeguards of appeals to judicial tribunals. In the exercise of the emergency powers conferred by war-time legislation, men have by the action of the Executive been deprived of the liberty of their person or of the liberty of movement and action. The exercise of trade has been drastically regulated and the trader, large or small, has in many cases been placed entirely at the mercy of individual executive officers.

The volume of this legislation is in itself appalling. The number of ordinances and orders and notifications issued under them has in this country run into many thousands. It is stated that in Canada since the war began about 16,000 orders-in-council were passed, and Regulations filling many thousands of pages were issued till April 1944.[2] The position in the United Kingdom and the other Dominions is similar.

This state of affairs has naturally exercised the minds of all thinking citizens and particularly of those who have been concerned with the administration of law. Efforts have been made in various countries to examine the character of Emergency Legislation and the manner and method of its

2. *Canadian Bar Review*, Vol. XXII, p. 384.

enactment and administration with a view to see if safeguards could not be provided both in respect of its enactment and administration which will bring these into consonance with principles underlying the constitution and the law of all democratic countries. In spite of the grave encroachments made by war-time legislation on the liberty of the subject, the principle that in a time of emergency the State should assume full control is not disputed. What is questioned is the application of the control and what has been called the 'Process, Form and Procedure of Control Legislation.'[3]

The first point which emerges is the propriety of the legislative form and process adopted, namely, Orders-in-Council, or Regulations, or Rules, as the case may be, enacted under the authority of and having legislative force under a statute, which leaves their promulgation to the sole discretion of the Executive : a Department or a Board or a Committee or even a single Officer. In the result the Executive concerned becomes the actual legislator. It is the Executive which takes the place of the elected representatives whom the citizens have trusted and to whom they have left the task of making laws in accordance with their wishes. No doubt, in a grave emergency these representatives are expected to act and would be right in acting in the matter of legislation without consulting their electors. But are they in such an emergency entitled to delegate their legislative functions to a number of Executive Bodies and Officers and thus in effect turn them into legislators ?

The further question which arises is in reference to the procedure adopted for the enforcement of control legislation. Under this procedure very frequently the Executive Bodies or Officers are given all the powers needed to enforce the legislation. It is they who are empowered to inquire whether the laws which they have promulgated have been broken, and to adjudge the extent of the breach and the punishment. This inquiry is very often a summary one regulated by no

3. *Canadian Bar Review*, Vol. XXII, p. 602.

procedural rules and conducted without reference to even the elementary canons of natural justice. The decision of the Executive Body or Officer is in many cases final or is at any rate not subject to any appeal to or examination by a judicial body. Even if it be necessary or expedient to constitute the Executive Bodies or Officers legislators, it may well be asked whether it is necessary to turn them into our 'inquisitors, policemen, judges and executioners.'[4]

Emergency powers are apt to grow and multiply and a democracy is ever watchful even during times of emergency to see that the powers said to be needed do not exceed the real requirements of the crisis. This view was expressed by Lord Sumner, in reference to the experience gained in the Great War of 1914-18 :

> Experience in the present war must have taught us all that many things are done in the name of the Executive in such times purporting to be for the common good, which Englishmen have been too patriotic to contest. When the precedents of this war come to be relied on in wars to come, it must never be forgotten that much was voluntarily submitted to which might have been disputed, and that the absence of contest and even protest is by no means always an admission of the right.[5]

These and the like are the problems which have arisen from war-time control and legislation and the purpose of this monograph is to discuss and examine them.

A consideration of these questions has perhaps an equal importance in reference to normal times of peace. In the Constitutional Law of England it is well established that the Executive has no arbitrary power over the subject and that certain rights of the subject cannot be invaded by executive action without his having the right to invoke the aid of the Courts. The questions, therefore, which arise out of war-time control and legislation, affect these vital principles which underlie and guarantee all civil liberties. More-

4. *Canadian Bar Review*, Vol. XXII, p. 384.
5. *Att. Gen.* v. *De Keyser's Royal Hotel*, (1920) A.C. at p. 563.

over, the growing extent and volume of delegated legislation even in times of peace has been the subject of great concern and noted exponents of jurisprudence have frequently questioned its propriety. The emergency conditions created by the war have resulted in this principle of delegation being extended to a vastly increased field. And this tendency to delegation, which has so largely been in vogue in war time, with the facility and ease which it confers on the Executive in the discharge of their many duties, is not likely to be quickly discarded on our return to peace. No doubt, a substantial part of war legislation is under its very terms to cease to have any effect with the end of the emergency. But the danger to civil liberties lies in the war-time habit of entrusting wide, arbitrary and uncontrolled powers to the Executive. And hence it becomes the more imperative to realize the full implications of the form and procedure of control legislation.

II. CIVIL LIBERTIES AND THE STATE

It is necessary, however, first to appreciate the conditions which have led to the rise and the growth of civil liberties and the true extent and scope of these liberties.

The concept of civil liberty is essentially rooted in the philosophy of individualism. According to this doctrine the highest development of the individual and the enrichment of his personality are the true function and end of the State. It is only when the individual has reached the highest state of perfection and evolved what is best in him that society and the State can reach their goal of perfection. The State has, therefore, to be so shaped and the governmental machine has to be so run as to provide for the individual full scope for his growth, development and perfection. In brief, according to this doctrine the State exists mainly, if not solely, for the purpose of affording the individual freedom and assistance for the attainment of his growth and perfection. The State has its being and exists for the benefit of the individual.

This concept is entirely opposed to the ideas which have led to the growth and rise of Fascist and dictatorial States.

The Fascist doctrine preaches the supreme importance of the State. There the individual and his activities have significance only in so far as they assist the existence, the needs and the activities of the State. The machinery of government of such a State and its laws are all designed to this end, namely, subordination of all the activities of the individual in the supposed interests of the State. It is obvious that in countries under such a system of Government, civil liberty and the rights of the citizen, as understood in a National Democratic State, must necessarily be very restricted. The activities of the citizen are from his very birth regimented, governed and entirely dominated by restrictions imposed in the supposed paramount interests of the State. In the result the ordinary rights of the citizens such as the freedom of his person or the freedom of speech, discussion, association and even the freedom of religious belief and worship exist merely on sufferance and only to the extent to which those who are in charge of the affairs of the State may think it prudent to permit. It would therefore be not an exaggeration to state that civil liberties as understood in a modern democratic State are or would be practically unknown in a Fascist or dictatorial State.

The political philosophy of individualism, based on the freedom of the individual to grow and develop and conduct himself according to his individual bent, insists that the individual should have as against the State certain rights and liberties of which he cannot be deprived. Civil liberties are therefore primarily the rights or liberties of the individual citizen against the State.

In a modern democratic State there is no necessary antithesis between the interests of the individual and those of the State. The justification of the existence of such a State can only be the advancement of the interests of the individuals who compose it and who are its members. Therefore in a properly constituted democratic State there cannot be a conflict between the interests of the citizens and those of the State. The individual citizen is by the constitution given the right to shape the laws and measures of

the State. And the aggregate of the citizens who themselves elect the governing body of the State and to whom the governing body is responsible would naturally be vigilant to ensure that the laws and the measures adopted by the governing body are for the benefit of, and in the interests of, the citizens. Thus harmony, if not the identity of the interests of the State and the individual, is the fundamental basis of the modern Democratic National State.

And yet the very existence of the State and all government and even all law must mean in a measure the curtailment of the liberty of the individual. The idea of government involves the vesting of authority in certain bodies and persons for the purpose of regulating the affairs of the State and the exercise of such authority by the persons or bodies in whom it is vested for the purpose of ensuring the peace, order and good government of the realm. The exercise of this authority must necessarily impinge to a certain extent on the freedom of action and the liberty of the individual citizen. But such a surrender and curtailment of his liberty is essential in the interests of the citizens of the State.

A corporate social life and the union of individuals into a political State can only be achieved by the sacrifice of a certain measure of freedom by each individual constituting the society and the political unit. The individuals composing the State must, in their own interests and in order that they may be assured the existence of conditions in which they can with a reasonable amount of freedom carry on their activities, endow those in authority over them to make laws and regulations and adopt measures which impose certain restrictions on the activities of the individuals. But these restrictions are in the common interests of all the individuals composing the State and indeed are essential to the very existence of the State.

It is true that the individual cannot attain to the highest in him unless he is in possession of certain essential liberties which leave him free as it were to breathe and expand. It may be said that good life, which, according to Aristotle, is

the very object for which the State exists, cannot be attained unless the citizen is in the enjoyment of these liberties. Indeed these liberties have been described by Mr. Justice Holmes as 'the indispensable conditions of a free society.' And yet it is equally true that it is only in a society which is ordered and regulated by laws that the individual has the opportunity to grow and develop, enrich his personality and thus attain to the best in himself.

And one must not forget that the very existence of civil liberties is rendered possible under a well ordered State capable of adequately maintaining law and order both in times of peace and war.

The ideal State would therefore seem to be one which can achieve by a suitable adjustment that balance between the authority of the State and the liberty of the individual which would leave to the individual the maximum liberty to plan, order and effect his growth and development in all the fields of life and at the same time afford him the protection needed for this purpose both from his fellow citizens and from forces outside the State. The true and the central problem of the modern State is to achieve this balance by careful planning and by a well ordered inter-action of different forces.

III. ESSENTIAL LIBERTIES AND THEIR CONSTITUTIONAL SAFEGUARDS

The expression 'Civil Liberties' has attained a well defined meaning. It refers to what have been called 'the fundamental rights,' or 'the inherent and inalienable rights,' or 'the natural or elementary rights' of the citizens. Whatever be the name used, these rights are no other than the most important liberties known to constitutional law; rights which have been epitomized in the famous 'Four Freedoms' enumerated by President Roosevelt. These rights or liberties may for our present purposes be stated as follows:—

1. Liberty of the person.
2. Liberty of religion and language.
3. Liberty of opinion including freedom of speech, of writing and the freedom of the press.

4. Liberty of enterprise including freedom of private initiative and industry.
5. Freedom of work.
6. Freedom of association including the right of meeting in public.
7. Right to private property and the security of property.

The love of power and the desire to dominate affairs with a view to further one's own ends are inherent in man. Even under systems of government democratic in their nature and responsible to the citizens, there has been experienced a persistent tendency in those who hold in their hands the reins of executive power to strengthen and augment these powers and thus encroach upon the liberties of the citizens.

In order to provide against this tendency on the part of the Executive to encroach upon the liberties of the citizens, modern democratic constitutions have evolved what are called the fundamental rights of the citizen. These constitutions expressly declare and guarantee these liberties by making them a fundamental part of the Constitution, and also provide methods for their enforcement whenever there is an encroachment upon these fundamental liberties by the Executive or by other citizens.

The Constitutions of the United States of America, Ireland and Soviet Russia are instances of this character.

The relevant provisions of the American Constitution may be reproduced here.

First Amendment (1791):

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.[6]

6. Willoughby, *On the Constitution of the United States*, Vol. I, p. 28 and following pages.

Fourth Amendment:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[7]

Fifth Amendment:

No person.....shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.[8]

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.....to be confronted with the witness against him; to have compulsory process for obtaining witness in his favour, and to have assistance of counsel for his defence.[9]

In Great Britain we have the general provisions ensuring the peaceful enjoyment of rights of liberty and the freedom of the subject from illegal detention, duress, or illegal taxation, in the four great Charters or Statutes, which regulate the relations between the Crown and the people.

The material passages are:—

The Magna Carta (1215):

No freeman was to be arrested, imprisoned, put out of his freehold, outlawed, exiled, destroyed, or put upon in any way except by the lawful judgement of his peers or the law of the land.[10]

The Petition of Right (1628):

No freeman should be forejudged of life or limb or imprisoned or detained against the form of the Great Charter and the law of the land.[11]

7. ibid. p. 28 and following pages.
8. ibid. p. 28 and following pages.
9. ibid. p. 28 and following pages.
10. Ridges, *Constitutional Law of England*, 6th Ed. p. 7.
11. Ridges, op. cit., p. 8.

The Bill of Rights:

The pretended power of dispensing with laws or the execution of laws as it hath been assured and exercised of late is illegal.[12]

The Bill of Rights is stated to be the nearest approach to a written Constitution which the United Kingdom possesses. Apart from the general provisions mentioned above, the liberties of the subject are not in the United Kingdom defined in any law or code. But these rights have been evolved and established as a result of a continuous struggle between the citizens aided by the law courts and represented in Parliament on the one hand and the Crown and the Executive on the other.

The right of liberty of the person owes its protection in Great Britain mainly to the prerogative Writs, particularly to the *Writ of Habeas Corpus* as reinforced by the *Habeas Corpus Acts*. That Writ is perhaps the most important Writ known to the Constitutional Law of England, affording, as it does, relief against all illegal restraint and confinement. It is a Writ of immemorial antiquity, an instance of its use having occurred in the thirtythird year of the reign of Edward I. That Writ has, through the ages, been zealously maintained by the courts of law as a check upon the illegal usurpation of power by the Executive at the cost of the liege.

There is in the Indian Constitution no provision dealing with or granting the fundamental rights of the citizen. When the present Constitution was in the making, it was rightly demanded that the Indian Constitution should, like the Constitutions of some other democracies, declare and affirm the right of the subject to these fundamental liberties. But in accordance with the traditional policy of Britain towards India, the demand was turned down, it being stated that 'Abstract declarations are useless unless there exists the will and the means to make them effective.' Notwithstanding the absence of such a provision, some of these liberties have in a somewhat attenuated measure been enjoyed by the Indian

12. ibid. p. 28 and following pages.

citizen. The Writ of Habeas Corpus has been incorporated with some modifications into our statute law. And the Judiciary, following British traditions and precedents, have endeavoured to maintain and even promote other liberties of the subject by a liberal interpretation of certain laws.

It may, therefore, be safely asserted that in all countries with democratic Constitutions, liberties of the subject are highly valued, and their fundamental rights are secured to them directly by being embodied in the Constitution or indirectly by the supremacy achieved by law and tradition as a result of a persistent struggle with the Executive.

In England, great emphasis has been laid on the liberties of the subject. During the latter half of the 19th century constitutional lawyers and jurists in England were dominated by the political philosophy of 'Individualism' which postulated that the existence of government was a necessary evil, and that the purpose of the constitution was to protect the rights of the individual. This attitude appears clearly from the treatment of Constitutional Law by Dicey in his famous book *Law of the Constitution.* Dicey's whole treatment of 'The Rule of Law,' which he considered as one of the fundamental characteristics of the English Constitution, is based on the theory that the purpose of the Constitution is to protect individual rights, an object which is achieved by the supremacy of the law. This view of Dicey has dominated the minds of English lawyers for more than two generations, and still continues to influence English legal thought. Even in 1940 Sir C. T. Carr, while fully conscious of the widening sphere of the State, speaking of the United States and Britain, observed:

> To both countries government tolerated as an unfortunate necessity, is but the means to an end; to both countries the end is liberty.[13]

This attitude emphasizes the intrinsic value of civil liberties at all times.

13. *Concerning English Administrative Law* (1941) Preface, p. ix.

IV. PRESERVATION OF CIVIL LIBERTIES

Even in countries governed by democratic constitutions, notwithstanding the declaration and guarantees contained in the Constitution or the supremacy of the law evolved as a result of struggle for centuries, persistent and continuous attempts have been made to encroach upon the liberties of the citizens.

Such an encroachment may take the form of an abuse of power, or an excessive use of power under the cloak of authority by the Executive, or it may be attempted by enacting laws which confer uncontrolled power on the Executive. The protection of the citizen against the first method of encroachment lies in the courts of law, whose traditions have always made them the guardians of the liberties of the subject. But it is to be remembered that courts of law can only afford protection to the citizen to the extent permitted by law; and the utmost that they can do is to put on laws restricting the liberty of the subject a construction most favourable to the subject. If the law is clear, the courts are powerless, because their function is only to administer the law, as it stands.

Attempts to enact laws subversive of the liberties of the citizen can only be met by the bulwark of a popular and representative Legislature which will refuse to pass such legislation except to the extent needed for the protection and advancement of the citizens. Liberty of the subject in England has been effectively preserved and progressively enlarged by the use of these two powerful weapons. As observed by Lord Wright:

> In the constitution of this country (England) there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved.[14]

14. *Liversidge* v. *Sir John Anderson*, (1942) A.C. p. 260.

In the United States of America, the 'judicial review' has been a potent safeguard of the liberty of the citizen.

The protection afforded by a popular and representative Legislature is available only in truly democratic States. India has not a government representative of and responsible to the people, and this potent weapon for the protection of the liberty of the citizen does not exist in any substantial measure in this country.

In countries under a system of representative and responsible government the laws enacted by the Legislature would be in conformity with the wishes of the people. If those laws in any way affect the liberties of the citizen, these liberties have been deliberately curtailed by the Legislature and the laws have been enacted because their enactment has been deemed to be necessary in the interest of the citizens and the State. Where the governmental machine is democratic, the precise laws at any given moment would embody the nation's ideas of peace, order and good government. Whenever by reason of a growth or change of ideas a conflict arises between the ideas underlying the laws and the notions of a majority of the citizens, it gets resolved in course of time by the functioning of the democratic machine itself. Where we have a system of representative and responsible government with a machinery elastic enough to bring about a harmony between the existing law and the prevailing notions of the citizens, and, a judicial system making it possible for an independent Judiciary to function, the liberties of the citizens are well protected, and, are in little danger of being seriously encroached upon or curtailed. Hence in most countries with democratic constitutions these enduring liberties of the people have, in spite of the attempts of the Executive to encroach upon them, been effectively and completely secured to the citizens. It may, therefore, be asserted that in a country with a national democratic government the problem of reconciling the conflicting claims of the authority of the State and the liberty of the citizen in the normal times of peace has been largely, if not entirely, solved.

V. CIVIL LIBERTIES IN TIMES OF EMERGENCY

We have considered the rise and growth of civil liberties and the ways in which they are preserved and enlarged in times of peace. We will proceed next to consider the position of civil liberties in a time of emergency such as war.

The very existence and enjoyment of civil liberties postulate the safety of the State. It is only when the State is free from internal dissensions and safe from external aggression that the normal life and activities of the citizens can grow and expand under the protecting wings of liberal and freedom giving laws. But if the State is in danger, civil liberties would be equally in danger. And in a time of stress when the very existence of the State is threatened, the Legislature of the State would be entitled to restrict the liberties of the citizens to the extent to which it may think it necessary to ensure the safety of the State. Public safety must needs be the highest law of all. And when the country is threatened by the grave emergency of war, its legislature is entitled to enact laws which it judges to be necessary for the preservation and the safety of the State, even if these laws vitally affect or restrict the liberties of the citizen. Such legislation is justified by the existence of the crisis and when enacted by a responsible and representative Legislature is in effect a surrender by the citizen temporarily of his liberty in the larger interests of the State, the political unit of which he is a member. This surrender of his liberty is agreed to by the citizen during the crisis in his own interest. As has been said, 'in the eternal dispute between the Government and liberty, a crisis means more Government and less liberty.' It has been aptly observed by Lord Justice Scrutton that 'war cannot be carried on according to the principles of Magna Carta, and that there must be some modification of the liberty of the subjects in the interests of the State.' In England, where the influence of individualism and of the doctrines of Austin and Dicey still holds sway, it is well accepted that in a time of war the Legislature would be entitled to endow the Executive with very comprehensive powers, the exercise of which would interfere with the most cherished liberties of the sub-

ject. An emergency must be met at any cost, and in meeting an emergency the citizen will submit to a curtailment and diminution of his liberty, which he will not permit during normal times of peace.

Dealing with the power of detention vested in the Secretary of State in a time of emergency, Lord Macmillan stated as follows :—

> But in a time of emergency when the life of the whole nation is at stake, it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject, the Courts would be slow to attribute to a peace time measure.....I yield to no one in my recognition of the value of the jealous scrutiny which our Courts have always rightly exercised in considering any invasion of the liberty of the subject. But I remind myself, in Lord Atkinson's words, that 'however precious the personal liberty of the subject may be there is something for which it may well be to some extent sacrificed by legal enactment, viz., national success in the war or escape from national plunder or enslavement.' The liberty which we so justly extol is itself a gift of the law and as Magna Carta recognizes may by the law be forfeited or abridged. At a time when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country's cause it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention.

There may well be a difference of opinion—indeed divergent views have already been expressed—in regard to the dictum of Lord Macmillan that a regulation may in a time of emergency bear a different meaning from that put on it in times of peace. Differing views may also be taken in regard to the nature and extent of the discretionary power to be vested in the Secretary of State even in a time of emergency. But no exception can be taken to the statement contained in the wise words of Lord Atkinson reproduced by Lord Macmillan.

It seems to have been suggested in the course of argument in the case in which Lord Macmillan made the above observations that, however great the emergency, civil liberties

of the subject—and in particular the right of the citizen to the freedom of his person—were sacrosanct and could not be restricted even by Parliament. In answering this argument Lord Wright made important observations in regard to the nature of the liberty of the subject and the powers of Parliament to affect it, particularly in times of grave emergency :—

> All the Courts today, and not least this House, are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty confined and controlled by law, whether common law or statute. It is, in Burke's words, regulated freedom. It is not an abstract or absolute freedom. Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty. If an Act of Parliament or a Statutory Regulation like Regulation 18-B, which has admittedly the force of a statute, because there is no suggestion that it is *ultra vires* or outside the Emergency Powers (Defence) Act, under which it was made, is alleged to limit or curtail the liberty of the subject or vest in the Executive extraordinary powers of detaining a subject, the only question is what is the precise extent of the powers given. The answer to that question is only to be found by scrutinizing the language of the enactment in the light of the circumstances and the general policy and object of the measure. I have ventured on these elementary and obvious observations because it seems to have been suggested on behalf of the appellant that this House was being asked to countenance *arbitrary despotic or tyrannous conduct*.....If extraordinary powers are here given they are given because the emergency is extraordinary and are limited to the period of the emergency.[15]

We have seen that the Constitution of the United States provides among other things that 'Congress shall make no law.....abridging the freedom of speech.' And such was the importance attached to these and other liberties of the subject embodied in the Constitution that the view was taken that however great the emergency facing the State, none of the provisions in the Constitution in regard to these liberties could be suspended or departed from. We may in this connexion recall the epoch making pronouncement made in the Milligan case :[16]

15. *Liversidge* v. *Sir John Anderson*, (1942) A.C., pp. 251-257.
16. *Ex parte Milligan* (1866) 1 Wallace 121.

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism.

But the experience and exigencies of modern war have led even the United States to a recognition of the doctrine that in a time of grave peril and emergency the interests and safety of the State must in a measure override the constitutional rights of the subject. This view was expressed in reference to the right of freedom of speech by Mr. Justice Holmes in the following words :—

> When a nation is at war many things that might be said in a time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and no Court could regard them as protected by any constitutional right.[17]

The authority of the Legislature in a National Democratic State to encroach upon and curtail the rights of the citizens in a time of emergency is thus admitted. The necessity of such encroachment in order to secure the safety of the realm is also admitted. The questions in debate are the manner of the exercise of this authority and the nature and extent of its exercise.

But it is of supreme importance to remember that the existence of this power and authority or the propriety of its exercise are conceded only during the existence of the emergency and solely for the purpose of meeting it ; and the extent of its exercise has to be strictly limited to the requirements of the emergency. It has to be and is to retain the character of ' Crisis Legislation,' so that immediately on the termination of the crisis or so soon thereafter as the conditions permit, the restrictions imposed have to be scrapped.

17. *Schenck* v. *United States*, 249 U.S. 47-52 (1919).

These are well accepted features of emergency legislation. It is now fully recognized that restrictions on civil liberties imposed during a time of crisis should not be tolerated a moment longer than absolutely necessary after the emergency has passed. This is evidenced by the recent attitude of the British Government in regard to crisis legislation. Within two days of the end of the war in Europe it took quick action and revoked some of the many Defence Regulations (including Regulation 18-B) which had curtailed the rights and freedom of citizens for over five years. That Government also revoked simultaneously powers to suppress newspapers, detain people without trial or explanation, prohibit certain meetings and processions, restrict trade disputes activities, and raise to the level of crime passing remarks liable to cause 'alarm or despondency.' This action was entirely in accord with the principle that crisis legislation must, as far as possible, end with the crisis. It cannot of course be suggested that all such legislation can come immediately to an end on the termination of the emergency. The effects of modern war, its disturbing and devastating influence on all aspects of civilian life, are so great that control legislation of many kinds must remain in force for a considerable time after the end of the emergency in order to bring back disorganized civil activities to the normal peace time conditions. With the gradual restoration of normal conditions, other restrictions affecting the funamental rights of the citizens will no doubt be done away with by the British Government and the citizens will again be free to pursue their normal actitivities uncontrolled and in an atmosphere of freedom.

VI. EMERGENCY LEGISLATION IN THE UNITED KINGDOM DURING WAR OF 1914-18

It will be useful next to examine in some detail the manner in which the State has proceeded in times of grave emergency to restrict the civil liberties of the people and the extent of the fetters placed on individual liberty by these restrictions.

When the First World War broke out in 1914, it was recognized in England that a national emergency had arisen and

large legislative and executive powers were conferred on Government such as could not have been contemplated in times of peace. The Defence of the Realm Act, 1914, was a short piece of legislation conferring on the Government power to make regulations for the purpose of 'securing the public safety and the defence of the realm'. An Amending Act conferred on the Government power to 'provide for the suspension of any restrictions on the acquisition or uses of land, or the exercise of the power of making by-laws, or any other power under the Defence Act, 1842 to 1875, or the Military Lands Acts, 1891 to 1903'. Further legislation conferred powers for the trial by Court Martial of a number of 'security' offences. These Acts were later, with some additions and alterations, consolidated in the Defence of the Realm Consolidation Act, 1914.

Though these powers were readily given by Parliament and the public in order to meet the situation created by the emergency, the administration of these emergency Laws and Regulations gave a rude shock in many directions to the minds of the citizens, who only then realized the extent to which uncontrolled executive legislation and action could proceed. Even during this critical time and notwithstanding the attitude of the citizens who wished to help the Executive in their difficult task of meeting the emergency, questions of considerable constitutional importance were raised by the public and taken to the Courts of Law, the ever watchful guardians of the liberty of the citizen. During this period was raised the important question about the comparative authority of the Prerogative and of Statute in regard to the requisitioning of land, a question which reached its final decision in 1920 when it was held by the House of Lords that the prerogative of the Crown was subordinate to and was curtailed by Statute.[18] The important decision of the House of Lords in *R. v. Halliday*,[19] in which the right of the Government under the Regulations to detain a person of 'hostile origin or associa-

18. In re a Petition of Rights, (1915) 3 K.B. 649; and in re *Attorney General* v. *De Keyser's Royal Hotel, Ltd.*, (1920) A.C. 508.

19. (1917) A.C. p. 260.

tions' was contested was also delivered during this period. That decision, no doubt, upheld the validity of the detention regulation in question. The decision is, however, important by reason of the long dissenting judgement of Lord Shaw, in which have been affirmed in a striking manner the principles governing the liberty of the subject and the dangers of entrusting large powers to the Executive. What was relied on was the principle of the generality of the power to issue regulations. The Crown urged that there were two limitations only to this generality: first, limitation as to time, viz., that the regulations could only be issued during the war, and, secondly, a limitation of purpose, viz., that they could be issued ' for the public safety and for the defence of the realm,' the Executive being the sole judges as to this limitation of purpose. Dealing with this principle of generality—the ' principle that during the war the Government may do what it likes '—Lord Shaw stated that ' against regulations thus construed nothing could stand. No rights, be they as ancient as Magna Carta, no laws, be they as deep as the foundations of the Constitution—all are swept aside by the generality of the power vested in the Executive to issue " regulations ". *" Silent enim, leges inter arma ".*'

It may, however, be stated that the Courts, while trying to maintain the liberty of the subject, were not unmindful of the needs of strengthening the hands of the Executive in a time of emergency and on occasions they leaned strongly in its favour by giving a strained construction to certain regulations. The judgements of the majority in *R.* v. *Halliday* clearly showed this tendency. Indeed, in 1918 Scrutton L.J. put forward this view in very clear and emphatic language:

> In time of war there must be some modifications in the interests of the State. It had been said that a war could not be conducted on the principles of the Sermon on the Mount. It might also be said that a war could not be carried on according to the principles of Magna Carta.[20]

Notwithstanding the advent of peace many of the powers assumed in the Emergency Powers Act continued. In 1920

20. *Ronnfeldt* v. *Philips,* (1918) 35 T.L.R., p. 47.

was enacted the Emergency Powers Act, which conferred very wide powers on the Executive in order to deal with emergencies arising during the time of peace. In fact these powers were exercised on more than one occasion. But the Court showed a greater disposition to question the limits of these powers and cases occurred in which some of the Regulations were held to be *ultra vires.*

In the years which followed the end of the war in 1918 delegated legislation, to which we shall have occasion to refer hereafter, greatly increased in volume and the powers of the Executive by reason of such legislation became more and more unfettered. This naturally gave rise to a feeling both among the public and the constitutional lawyers that it was necessary to consider the whole question of delegated legislation and the extent to which it should be permitted having regard to the principles underlying the British Constitution. The growing feeling in the public mind and the comments from time to time made by judges and constitutional lawyers led to the appointment of a Committee under the chairmanship of Lord Hewart (then Sir Gordon Hewart) in 1927 and to the appointment in 1929 of a Committee to examine the question of Ministers' powers under the chairmanship of the Earl of Donoughmore. The report of the latter Committee and the documents collected by it are of great constitutional importance. This Committee made valuable recommendations ; but only a few of its recommendations were given effect to. And notwithstanding the uneasiness so often expressed and the report of this Committee, the tide of delegated legislation conferring ever growing powers on the Executive continued to rise.

VII. EMERGENCY LEGISLATION IN THE UNITED KINGDOM DURING WORLD WAR

The outbreak of the World War in September 1939 did not find the Executive in England unprepared. Immediately after the declaration of war, a large volume of emergency legislation was speedily put before the Parliament and enacted into law. This legislation related to all aspects of the life of

the community and was based on the experience acquired during the Great War of 1914-18 and later events supplemented by a consideration of the changes needed by the altered conditions of warfare in 1939 as compared with those in the earlier war. A number of measures were intended to deal with the expected war-time economic conditions, and, controls were established among other things on prices and imports and exports. An attempt was made to deal with the question of compensation comprehensively, a subject which had caused difficulty and had been the subject of litigation during the earlier war.

However, the important pieces of legislation which enabled Regulations to be framed interfering with all aspects of the life of the citizen were the Emergency Powers (Defence) Acts of 1939 and 1940. The Act of 1939 enabled Regulations to be made, by Order-in-Council, *inter alia,* for the public safety, defence of the realm, the efficient prosecution of war, maintaining supplies and services essential to the life of the community, detention of persons 'whose detention appears to the Secretary of State to be expedient in the interests of public safety or the defence of the realm,' the taking of possession or control of any property or undertaking, and, the acquisition of any property other than land. It was provided by this Act that no Regulation framed under it was to be invalid by reason of its inconsistency with an existing enactment. It was further enacted that the powers conferred by it might be delegated to such authorities or persons as might be specified in the Regulations. One of the notable powers conferred by the Act was the power of amending or suspending any enactment in force, a power which has been very widely exercised.

The only safeguard against the Executive being given the widest powers under the control Regulations was that the Regulations made under the Act were to be laid before Parliament soon after they were made and were subject to a resolution of annulment by either House within a certain number of days. However it was provided that the Act was renewable yearly by address of both Houses and was to automatically

cease to be operative on a declaration that the emergency was at an end.

The Emergency Powers (Defence) Act of 1940 extended the power to make Regulations to 'making provision for requiring persons to place themselves, their services, and their property at the disposal of His Majesty' in the manner and to the extent that may be provided in the Regulations. Further legislation passed during the same year provided for the setting up of special Courts for summary trial; and under it Regulations were issued for the constitution of War Zone Courts.

It is evident that the purview of these Emergency Acts was far greater than that of the Defence of the Realm Acts passed during the war of 1914-18; and the Regulations enacted under these Acts affected every conceivable aspect of national life and were more drastic than any enacted under the Defence of the Realm Acts.

It is a tribute to the healthy democratic spirit pervading the British Constitution that even during that time of grave national emergency and peril Parliament raised a controversy as to the necessity of some of the Defence Regulations placed before it soon after the Act of 1939 was enacted. As a result of the controversy in Parliament, substantial modifications were introduced into the Regulations and some restrictions placed on the powers of the Executive.

The Defence Regulations were to start with about a hundred in number. With the progress of the war their number, however, greatly increased. In regard to their scope, they extended to every conceivable aspect of national life.

These Regulations were made in the form of Orders-in-Council and by them the rule making power was conferred on the 'relevant authorities.' The competent authorities were various, consisting of a responsible Minister, official bodies, superior officers and subordinate officials. As we have seen before, the Act itself provided for the delegation of the powers under it to certain representatives. This power of delegation was exercised in the widest manner and large powers were

entrusted to a large body of officials appointed to exercise various powers conferred by the Regulations.

The Regulations made in the form of Orders-in-Council were merely the framework in which came to be fitted in course of time numerous further Regulations and Orders, some of them in themselves long and elaborate codes.

In addition to the general Regulations and Orders, there are many Directions with regard to specific matters, so that the hierarchy becomes (1) Statute, (2) Regulations, (3) Sub-Regulations and Orders made under Regulations and Orders, and (4) Directions, Permits, Licenses, etc., under Sub-Regulations made under Regulations and Orders. More than 10,000 Regulations, Rules and Orders have been issued during the war. The number of Directions is countless.[21]

VIII. LIBERTY OF THE PERSON: REGULATION 18 B

The Defence Regulation which has figured most prominently before the public eye is perhaps Regulation 18-B, a Regulation which disappeared immediately on the termination of the European War. Though the Regulation is dead, the controversy it evoked and the pronouncements of the House of Lords on it in *Liversidge* v. *Anderson* constitute a landmark in the history of British Constitutional Law. Compared to the numbers detained in this country under the counterpart of Regulation 18-B, viz., Rule 26 of the Defence of India Rules, the number of detenus was very small. The total number of persons detained, according to the figures given in June 1944, was 1829, and the maximum number in detention at any one time is stated to be 1328. And by the end of May 1944 the number of those who remained in detention had fallen to 226 only. Having regard to the nearness of England to the actual theatre of operations of the European War and the large elaborate organization of what has been called the Fifth Column by Enemy Countries, these numbers could by no means be said to be large. Nor could it be said that there was any very great public feeling against the deten-

21. C. K. Allen, *Law and Orders*, p. 215.

tion of many of these detenus, though, no doubt, some of those detained were shown to have been detained entirely without reason and justification. However, what excited comment in a considerable body of people who attached importance to constitutional rights and liberties was the provision in the Regulation which enabled the Minister, however highly placed, to deprive a subject of the liberty of his person, and the interpretation placed on the Regulation by the highest tribunal in the country.

The Regulation, as originally framed, gave the Secretary of State power to detain a person 'if satisfied ..... that it is necessary to do so.' The original Regulation was amended by substituting the words 'if the Secretary of State has reasonable cause to believe' for the words 'if satisfied'; so that the Regulation as amended empowered the Secretary of State to make an order of detention against a person if he had reasonable cause to believe that person 'to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him.' The Regulation provided for the setting up of Advisory Committees to whom a person detained may make objections. It also provided that the Minister was to give the detenu the earliest opportuntiy of making representations to the Secretary of State and was to inform him of the right of making his objections to the Committee. An obligation was laid on the Committee to inform the detenu of the grounds on which the order had been made against him and to furnish him such particulars as in the opinion of the Chairman were sufficient to enable the detenu to represent his case. It provided for a report to Parliament from time to time of the action taken under the Regulation.

The functions of this Committee were purely advisory, and the Secretary of State was not bound to adopt its recommendation, though in practice in a large number of cases the recommendation may have been accepted. The sittings of the Committee were to be held in camera and its report was

confidential. The detenu was not allowed full information to meet the charges levied against him, nor was he allowed to be represented before the Committee by his legal adviser. A machinery of this unsatisfactory character necessarily resulted in a number of persons being arrested and detained without any justification whatever and incidents of this character were brought to light in the House of Commons.

It is not surprising, under the circumstances, that the Regulation came up before the Courts of Law in a number of cases, the most important being the decision of the House of Lords in *Liversidge* v. *Anderson*.[22] The main question which arose for decision in that case related to the interpretation of the words 'if the Secretary of State has reasonable cause to believe' in that Regulation. For the subject, it was urged that the words conferred on the Minister only a conditional authority to detain any person without trial, the condition being that he has in fact reasonable cause for the belief which leads to the detention order. The Court had, therefore, to be satisfied in each case that the condition had been fulfilled; in other words, the Secretary of State was, whenever his decision was challenged, to satisfy the Court that he had reasonable cause to believe what he alleged against the person detained. The answer made on behalf of the Crown was that the language of the Regulation indicated that its intention was to attach to the words 'if the Secretary of State has reasonable cause to believe,' a 'subjective' meaning; so that what had to be decided by the Court was not the question whether on the materials placed before it a reasonable cause did objectively exist, and the only question for its determination was whether the Secretary of State thought subjectively that there was a reasonable cause. The result of the contention of the Crown was that the only condition implied by the Regulation was that the Secretary of State was to act in good faith; and, as such good faith could hardly be ever successfully disputed, the Regulation gave the Minister a complete discretion.

22. (1942) A.C. p. 206.

The dissenting speech of Lord Atkin pointed out a number of provisions of the Common Law and Statutes which showed that the plain and natural meaning of the words 'has reasonable cause' imported the existence of a fact or state of facts and not the mere belief by the person challenged that the fact or state of facts existed. He further showed that that meaning of the words had been accepted in innumerable decisions for many generations and that 'reasonable cause' for a belief when the subject of legal dispute had always been treated as an objective fact to be proved by one or other party and to be determined by the appropriate tribunal. In regard to the 'subjective' meaning contended for by the Crown, it was pointed out by him that it had never at any time occurred to the minds of counsel or judges that the words were even capable of meaning anything so fantastic. Lord Atkin ended by referring to the great importance of protecting the liberty of the subject.

'I view with apprehension,' said he, 'the attitude of Judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the Executive.....It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the Judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the Executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I.....I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the Minister.'

The majority of the Court, however, remained convinced of the validity of the subjective construction which had been put forward by the Crown. It was indeed conceded by the Lord Chancellor that, in the absence of context, the *prima facie* meaning of such a phrase as 'if A.B. has reasonable cause to believe' a certain set of circumstances or thing, would be 'if there is in fact reasonable cause for believing' that thing. But it was pointed out that those words can not only have that meaning. And it was stated

that if the thing to be believed was something which was essentially one within the knowledge of A.B. or one for the exercise of his exclusive discretion, the words might well mean if A.B. acting on what he thinks is reasonable cause (and, of course, acting in good faith) believes the thing in question. It was then pointed out that the context of the Regulation and a number of circumstances tended to support the latter conclusion.

The speeches of Lord Maugham, Lord Macmillan and Lord Romer indicate the extent to which the Court was influenced in adopting the subjective construction by the conditions of emergency which then prevailed. Lord Maugham stated that the rule that legislation dealing with the liberty of the subject must be construed, if possible in favour of the subject and against the Crown had 'no relevance in dealing with an executive measure by way of preventing a public danger when the safety of the State is involved.' Among the permissible sources of guidance for the interpretation of the relevant words in the Regulation to which Lord Macmillan called attention, he referred in the first place to the important fact that the Regulation in question was a war measure. While affirming that the Courts ought not in war time to adopt canons of construction different from those which they followed in peace time, he proceeded to state that in a time of emergency when the life of the whole nation was at stake, it may well be that a Regulation for the defence of the realm might quite properly have a meaning which because of its drastic invasion of the liberty of the subject the Courts would be slow to attribute to a peace-time measure. He then pointed out that the liberty of the subject which was so justly extolled was itself the gift of the law and as Magna Carta recognized may by the law be forfeited or abridged. While dealing with the argument that the words 'if he has reasonable cause to believe' had been consistently regarded in English Law as postulating the existence in fact of reasonable grounds for belief, Lord Romer stated that the context and circumstances in which the words had been used might show that the most familiar words and expressions had been used in other than

their ordinary meaning. Among the circumstances relied on by him were the fact that the person who was to have reasonable cause to believe was not some minor official holding a subordinate position, but the Secretary of State, and the acts concerning which the belief was to be entertained were not infractions of Municipal Law in times of peace but acts prejudicial to the public safety and the defence of the realm in a time of grave national danger.

This decision of the House of Lords has been the subject of strong and conflicting comment. Writers on jurisprudence like Professor Goodhart and Sir William Holdsworth have acclaimed it on the ground that the House had abandoned a strictly literal interpretation of the Regulation in order to give effect to the believed real intention of Parliament, and that the case involved no justiciable issue, but merely an Executive act which was not open to legal review. On the other hand, other writers have challenged its wisdom in placing a new interpretation on a term familiar to English Law and opening up 'the era of "subjective" cause.' The emphasis placed by Lords Maugham, Macmillan and Romer on the fact that the power under the Regulation had been entrusted not to a minor official, for example, a Police Constable, but to one of the high officers of the State has been said to be contrary to 'one vital aspect of the Rule of Law ..... that all persons are equal before the Law.' It has been said that if that decision is 'not to have a permanently damaging effect on the constitution and on the jurisdiction of the Courts, great vigilance will be needed in future to see that Regulations and Orders are not framed in such a manner as to leave the interpretation and administration of sub-laws entirely to the 'subjective' discretion—i.e., to the mere opinion and *ipse dixit*—of the Executive.'[23]

The ancient writ of Habeas Corpus was sought to be availed of on a number of occasions by persons detained under Regulation 18-B. In *R.* v. *Home Secretary,* ex parte Lees,[24]

23. C. K. Allen, *Law and Orders,* p. 243.
24. (1941) I.K.B. p. 72.

the first reported case where an application was made for this writ, it was held that the Home Secretary having sworn that he had reasonable cause for exercising the control over the person detained, the Court was bound to accept that affidavit and could not examine into the cause of detention. The application failed and this decision was eventually confirmed in Appeal. A further step was taken in Greene's case,[25] which was decided on the same day as *Liversidge* v. *Anderson,* when the House of Lords held that the production of the Home Secretary's Order, the authenticity and good faith of which were not impugned, constituted a complete answer to an application for a writ of Habeas Corpus, and that no affidavit by the Home Secretary justifying his cause of belief was necessary. These and other cases in which the writ was sought showed that in practice no person detained could successfully ask for the issue of the writ.

One of the acts of the Government, after the end of the European War, was the repeal of this much debated Regulation. However, the story of this Regulation, as unfolded in the few cases which came before the Courts, has a deep and significant lesson for the future. It must not be forgotten that only a very few out of the many cases of detention came before the Court. Even these few cases disclosed facts which showed that the methods adopted were hardly appropriate in dealing with a matter so precious as the liberty of the subject. Some of these cases disclosed grave errors, the persons detained being given in the detention order one ground for detention, whereas at a later stage when he appeared before the Advisory Committee a different ground was put forward by the authorities. Such an error could only be explained by the faulty procedure adopted in gathering information and the unsatisfactory tests which were applied in sifting it. In some cases actions were brought by the persons detained in order to vindicate their character. In these proceedings on more than one occasion it was shown that the charges brought

25. (1942) A.C. p. 284.

against the persons detained were based upon the statements of persons which were established to be entirely false and unfounded; indeed in some cases the informant himself admitted them to be false. It has been rightly urged that if, instead of constituting the Secretary of State the sole and arbitrary judge, assisted by the recommendations of a purely advisory body, the persons detained had immediately after detention been allowed on proper evidence and represented by their legal adviser to represent their cases before some judicial body or tribunal empowered to deal with it, in however summary a manner, such unfortunate results could have been avoided.

IX. DEFENCE REGULATIONS AS A WHOLE

It is important to notice the broad effect on legal and constitutional principles of the Defence Regulations as a whole.

The doctrine of *ultra vires* has been for a long time the bulwark of the subject against the attempts of the Executive to encroach on his liberties by the enactment of regulations and bye-laws under the supposed authority of an enacting power conferred by Statute. It is by the application of this principle that the Courts have on numerous occasions vindicated the constitutional doctrine that the legislative function of the State has to be exercised by the duly constituted Legislature and not by the Executive, under a supposed power conferred on it by the Legislature. The manner in which war-time legislation has been framed has, it is clear, led to a complete paralysis, if not the total extinction of the doctrine of *ultra vires*.

Section 1(1) of the Emergency Powers (Defence) Act of 1939 enables His Majesty by Order in Council to make such regulations 'as appear to him to be necessary or expedient' for the various purposes mentioned in that subsection. By sub-section (2) of that Act, His Majesty was further enabled, without prejudice to the power given by subsection (1), to make regulations for the purposes mentioned in that sub-section in so far as it may appear to His Majesty

in Council 'to be necessary or expedient.' It is obvious that it would be difficult, if not impossible, to challenge any regulation made under this very wide power on the ground of *ultra vires,* for the challenge would be promptly met by the answer that the regulation in question was in the opinion of the authority 'necessary or expedient.' As soon as the authority concerned puts before the Court a statement on affidavit that in his opinion the regulation was necessary or expedient, whatever the view of the Court and however extravagant the power conferred may be, the Court would be incompetent to question the validity of the regulation. The position would be no different from that which arose in *Liversidge* v. *Anderson* in regard to the words 'has reasonable cause to believe' and the theory of a subjective construction which was applied to those words. Perhaps, even the arguments addressed on behalf of the subject in that case will not be open, as the words of the section make it clear that the regulations have to appear to be necessary or expedient to His Majesty in Council and not to the tribunal before which the question may come up for decision. The language of the sections referred to above may be contrasted with the provision of the Defence of Realm Act of 1914 which merely gave His Majesty 'power during the continuance of the present war to issue regulations for the public safety and the defence of the realm.' Those words left room for the operation of the doctrine of *ultra vires* and on more than one occasion certain regulations were held by the Courts to be *ultra vires.* It may, therefore, be concluded that the weapon of *ultra vires* has by reason of the language of the Acts ceased to be of any practical utility to the subject. The matter is of great importance for it is likely that, even though the war has ended, the Executive, accustomed to a rule making power couched in such wide terms, is unlikely easily to reconcile itself to the use of the narrower words which would enable the Courts again to apply the principle of *ultra vires.*

Attempts were made by the subject to question the very wide powers of requisition of premises under the Regulations on the ground that the reasons for the requisition were not

satisfactory and the power had not, therefore, been validly exercised. This contention naturally failed, the Courts again taking the view that it was not for the Courts to decide whether the premises were requisitioned for proper reasons but for the competent authority to determine whether in his view the circumstances necessitated the requisition.

A striking feature of war-time legislation has been its enormous volume and infinite variety. This is perhaps inevitable by reason of the number and complexity of the matters which had to be regimented and regulated by control. This legislation is not to be found only in regulations and orders but, as has already been mentioned, in a vast number of directions, *communiqués* and departmental orders and instructions, all issued under the authority of various powers and difficult of access to the citizen. The result has necessarily been to leave the average citizen in a state of complete ignorance of the details of this war-time legislation.

In the circumstances, it is not surprising that the citizen has given up in despair all attempts to keep himself abreast of the law and thus keep within its four corners. All that he can do is to gather such information as may be made available to him by publication of the directions and *communiqués* which appear from time to time in the press. And these publications are naturally not exhaustive, being mere summaries made by the newspaper editor of the relevant notifications.

And even if the citizen were to have an easy access to these numerous notifications, it would be difficult for him to appreciate their meaning and purport. The involved and ambiguous language of these notifications and directions has been a matter of common experience; indeed it has been no easy task even for the trained lawyer and the Court of Law to appreciate the meaning of some of them. Having regard to the circumstances under which these are issued, one does not expect them to be drawn up with the skill and care bestowed on the drafting of statutes. And yet these orders and notifications so vitally concern the ordinary citizen—the

householder, the trader and the shopkeeper—that it is most essential that they should be framed in the most simple and intelligible language.

Probably, the real reason for the unsatisfactory drafting and language of these regulations, notifications and directions is to be found in the ease with which amendments could be made in them and omissions supplied. The care and forethought which the Parliamentary draftsmen bestow on the drafting of a statute or Order in Council arise from a desire to make them as accurate and as comprehensive as possible; so that their working and enforcement may be smooth and the need for amendments with the necessary approach to the Legislature may be avoided. This incentive was wholly lacking in respect of these directions and notifications; for the Executive could at its sweet will make overnight such alterations as it pleased in them. One is familiar with the light-hearted and almost flippant manner in which some of these directions and notifications were amended from week to week; so that the persons affected or concerned could hardly ever know with certainty what the law was. Indeed so frequent and confused were the changes that on occasions even the departments concerned were unable to give accurate information as to what the state of the Law was. It is not disputed that the rapid change of circumstances arising out of the war would necessitate amendments. What is criticized are the frequent amendments which were necessitated by the absence of the necessary care and forethought.

A familiar feature of this voluminous legislation and quasi legislation was the large number of new offences and penalties for their breach which came into existence. It has been said that so multifarious were these offences and so few were the means at the disposal of the citizen to have full knowledge of the law and his liability under it, 'that it was difficult for the most virtuous to avoid crime' and that 'the most respectable citizen may at any moment become a criminal.'[26]

26. C. K. Allen, *Law and Orders*, p. 224.

In most of the new offences created the element of *mens rea* was lacking—a position totally destructive of the elementary principles of criminal jurisprudence. Nor did it seem to be essential that the notification or direction of which a breach was alleged against the citizen should have been published so as to be brought to his notice or at any rate in necessary time to enable knowledge of it to have reached the citizen. In a number of cases convictions were made, contrary to well accepted principles of criminal law, in cases in which the notification or direction had been so recently published and published in a manner that the citizen could not possibly have known of it at the date of the alleged offence. The well accepted principle of law which discourages retrospective legislation imposing higher penalties applicable to acts already complete at the date of the passing of the law appeared also to have been ignored in the enactment of some of this legislation.

The difficulties of the citizen were aggravated by the zeal of the large staff of officials, whose business it was to see that the regulations were observed and whose very existence depended on bringing to light breaches of these regulations and orders. In the circumstances, the broad vision which prevents the ordinary official from taking proceedings in respect of technical breaches and breaches committed in *bona fide* ignorance of the provisions of the law was found wanting and numerous prosecutions were launched at the instance of the special staff which would never have been brought before the Courts by the ordinary police officials. In the United Kingdom the number of prosecutions in respect of these offences became as high as 2,000 or 3,000 a month. Many of these revealed circumstances which indicated that the offences had been committed by persons who were ignorant of the material rule or order and in circumstances in which it was difficult, if not impossible, to obtain sufficient knowledge of them. However, in the eye of the law, the offences had been committed and it was not often that the persons charged escaped a conviction.

This state of affairs undoubtedly tended to undermine respect for law which is the very basis of civilized jurisprudence. When numerous persons, who are according to the ordinary canons of criminal law innocent, are convicted from day to day for offences which they could not have avoided committing for the simple reason that they did not know the law, the dignity of law and respect for its administration must considerably suffer. This certainly is a matter for grave reflection; and measures which would prevent the enforcement of laws in this manner need clearly to be devised.

X. EMERGENCY LEGISLATION IN THE DOMINIONS

The measures taken in the Dominions were similar; and this may be illustrated by a reference to what happened in Canada.

A question had been raised after the war of 1914-18 as to whether the Dominion Parliament had power to enact the Canadian War Measures Act, 1914, and the Orders in Council made under it. The Privy Council held this legislation to be *intra vires* and decided that that Parliament had

> an implied power, for the safety of the Dominion as a whole, to deal with a sufficiently great emergency, such as that arising from war, although so doing it trenches upon property and civil rights in the Provinces, from which subjects it is excluded in normal circumstances..... The enumeration in Section 92 is not repealed in such an emergency, but a new aspect of the business of Government emerges. The Dominion Government, which in itself represents the people of Canada as a whole, must be deemed to be left with considerable freedom to judge whether a sufficiently great emergency exists to justify an exercise of the power.[27]

The conclusion arrived at was bold and far-reaching and had the effect of bringing the legislation enacted by the Dominion Parliament by reason of the emergency of the war

27. *Fort Francis Pulp and Power Co., Ltd.*, v. *Manitoba Free Press Co. Ltd., and others*, (1923) A.C. p. 695.

within the language of Section 91 of the British North America Act. The decision was based on the very existence of the emergency which made the challenged enactments laws needed for 'the peace, order and good government' of Canada as a whole.

> In the event of war when the national life may require for its preservation the employment of very exceptional means, the provision of peace, order and good government for the country as a whole may involve effort on behalf of the whole nation, in which the interests of individuals may have to be subordinated to that of the community in a fashion which requires Section 91 to be interpreted as providing for such an emergency.[28]

On the outbreak of the world war in 1939, the War Measures Act (R.S.C. 1927, c. 206) which was enacted for the war of 1914-18 was utilized for the purposes of this war.

Section 3 of the Act provided that 'the Governor in Council may do and authorize such acts and things, and make from time to time such order and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada.' The section then proceeded to declare 'for greater certainty but not so as to restrict the generality of the foregoing terms,' that the powers of the Governor in Council were to extend to all matters coming within the classes of subjects therein enumerated. The enumeration included (a) the control and suppression of publications and writings, (b) arrest and detention, (c) trading, exportation, importation, production and the manufacture, and, (d) appropriation, control, forfeiture and disposition of property. The section finally provided that orders and regulations made under it 'shall have the force of law, and shall be enforced in such manner and by such Courts, officers and authorities, as the Governor in Council may prescribe.....' By a further section of the Act, the Governor in Council was authorized to prescribe

28. ibid, p. 703.

the penalties that may be imposed for violation of orders and regulations made under the Act. It was also provided that the powers given to the Governor in Council were to be in force only 'during war, invasion or insurrection real or apprehended.'

The greater needs of the world war required larger powers to be exercised and soon after the commencement of the war in 1939 was enacted the Mobilization Act (IV Geo. VI c. 13) which corresponded to III and IV Geo. Vi c. 20, passed in England and popularly known as Everything and Everybody Act. It provided that

> The Governor-General in Council may do and authorize such acts and things and make from time to time such orders and regulations, requiring persons to place themselves, their services and their property at the disposal of His Majesty in the right of Canada, as may be deemed necessary or expedient for securing the public safety, the defence of Canada, the maintenance of public order, or the efficient prosecution of the war or for maintaining supplies or services essential to the life of the community.

A vast mass of Federal Legislation was enacted within the framework of these statutes and thousands of Orders in Council, orders of Boards and Rulings of subordinate bodies and civil employees were brought into existence imposing extensive control on the activities of the subject throughout Canada.

It may be noticed that there is no provision in either of the two statutes analogous to that contained in the Emergency Powers Act enacted in England providing that regulations made under the Act were to be laid before Parliament as soon as may be after they were made and were subject to a resolution of annulment by either House within the time limited.

In pursuance of the powers contained in this legislation, very large powers were delegated to the Executive both in the Federal and in the Provincial field. These powers included, amongst others, the power of

> (a) rendering inoperative an Order in Council, a statute of Parliament or of a Legislature;

(b) empowering the Executive to 'supply deficiencies in a statute,' or 'to carry out the true intent' of a statute, or 'to meet cases not provided for' therein;

(c) imposing, changing and lifting fines and penalties at discretion, or with discrimination;

(d) levying taxes, fixing or changing the rate thereof, abating sale, or granting exemptions from time to time, the whole at discretion or with discrimination, either between corporations of the same type, or between individuals;

(e) granting, refusing or suspending, business licenses at discretion, i.e., for reasons other than the fulfilment of the conditions previously determined by law or regulations;

(f) giving a Minister, or subordinate bodies, judicial or semi judicial powers without appeal; and

(g) authorising the Executive to dissolve companies at discretion.[29]

These are very wide powers and in some cases the safeguards which one finds in the corresponding English provisions have not been enacted in Canada. Extensive legislative powers have been delegated to subordinate bodies and there has been a large amount of what has been called sub-delegation. Further, judicial and semi judicial powers have been widely entrusted to the executive and departmental bodies without any right of appeal either to the Courts of Law or to judicial bodies independent of the Executive.

The counterpart of Regulation 18-B in England is to be found in Regulation 21 of the Defence of Canada Regulations. That Regulation provided, *inter alia*, as follows:—

(a) The Minister of Justice, if satisfied that, with a view to preventing any particular person from acting in any manner prejudicial to the public safety or the safety of the State it is necessary so to do, may notwithstanding anything in this Regulation, make an order—

(b) imposing on him such restrictions as may be specified.....in respect of his activities in relation to the dissemination of news or the propagation of information; and

29. Report of Committee Civil Liberties, *The Canadian Bar Review* Vol. 22, p. 605.

(c) directing that he may be detained in such place, and under such conditions, as the Minister of Justice may, from time to time, determine.

It is the Minister of Justice who has to be satisfied in the manner mentioned in the Regulation and not a Court of Law; and, presumably, if he stated that he is so satisfied, the Courts cannot proceed to examine the grounds on which he may have felt satisfied. The Regulations make provision for the appointment of Advisory Committees by the Minister, whose function is to consider and make recommendations to the Minister with respect to any objections against any order which may be made under Regulation 21. The person charged is to be supplied with such particulars of the reasons for the order made against him as, in the opinion of the Chairman of the Committee, the circumstances permit; and the Minister has to put before the Committee all the information about the accused which he may have except such as is not in the public interest to disclose.

Some of the familiar principles of criminal jurisprudence have been disregarded in framing various Regulations and these have affected in a considerable measure criminal law and procedure in relation to the rights and liberties of the subject.

Under different Acts and Orders, Federal and Provincial, citizens are sometimes arrested without warrant, are subjected to examination as to their guilt, and forced to speak against themselves, and their evidence may be filed by the Crown at trial, against all rules of Common Law. In many cases, under either civil or criminal law, prerogative writs have been abolished.[30]

Some of the Regulations create a presumption of guilt against an accused person in criminal matters; and contrary to the well established principle of British jurisprudence that a person has to be presumed to be innocent till his guilt is

30. Report of Committee on Civil Liberties, *The Canadian Bar Review*, Vol. 22, p. 610.

proved, put the burden of proving his innocence on the accused person.

That, in brief, is the picture of the Emergency Legislation enacted in Canada. Attempts were made in that country, as in England, to challenge some of the very far-reaching Regulations on the ground of *ultra vires*. It was contended that the delegation by the Dominion Parliament to the Governor in Council of the power to make such Regulations as he may deem necessary or advisable was an abdication by Parliament of its powers and that a subordinate legislature with its powers of legislation limited by the British North America Act was not competent so to abdicate its functions and create in effect another legislative body. For this contention reliance was placed on the leading case of In re The Initiative and Referendum Act.[31] It was further argued that in any event the wide delegation and sub-delegation made by the Regulations in favour of subordinate bodies was not legal and competent and in this connexion the maxim *delegatus non-potest delegare* was relied on. The answer made by the Courts was that the Dominion Parliament had in no way abdicated its legislative powers to the Governor in Council for by Section 3 of the War Measures Act the Governor in Council was only given a power to make regulations for limited purposes, viz., 'the security, defence, peace, order and welfare of Canada.' It was held that the Canadian Legislature, though it derived its powers from the British North America Act, was within the ambit of those powers as full and competent as the British Parliament to delegate functions to subordinate authorities and that the maxim referred to had no application.[32]

It appears that Emergency Legislation in Australia was also enacted on lines similar to those in Great Britain and Canada. Attempts similar to those made in Great Britain and Canada were also made in Australia to challenge some of its

31. 1919 A.C. p. 935.
32. In Reference, *The Regulations* v. *Chemicals*, 1943 S.C.R. p. 1.

provisions restricting the liberties of the subject and met with a similar fate.

This shows that in the Dominions as in Great Britain the citizens were prepared, in view of the emergency threatening the very existence of the Empire and some of the Dominions, to sacrifice their liberties ; and that Courts of Law, conscious of the grave position arising by reason of the emergency, did their utmost to uphold the legislation which was the foundation of the wide powers needed by the Executive in the emergency. This readiness of the citizen to trust the Executive in a time of emergency makes it the more necessary to circumscribe as far as possible by necessary safeguards the exercise of these very wide powers. The emergency must needs be met, for the nation and the State must continue to exist. And yet it is equally in the interests of the individual and the State that the interference with the ordinary rights of the citizen should be no more than the real needs of the emergency demand.

XI. POSITION IN STATES NOT DEMOCRATICALLY GOVERNED

We have so far dealt with the course taken by emergency legislation in the United Kingdom and the Dominions which may be described as national democratic States. The emergency legislation enacted in India and the history of its enforcement emphasize that the problems arising out of such legislation in a State which is not a national democratic State differ essentially from those arising in a National Democratic State.

In countries with democratic constitutions, particularly where the constitution by its terms does not define the fundamental rights of the people, the safeguard of liberty lies in the system of representative and responsible government operating in the country. In such countries the postulate is the exsitence of harmony between the interests of the State and those of the citizens. And though for a time the legislative measures of such a State may not conform to the wishes of the majority of the citizens, the citizens undoubtedly have

the power to bend them to their will; so that in course of time there will be a rough correspondence between the wishes of the majority of the citizens and the legislation enacted by the State. However, in a State which is not democratic there can be no such harmony. The Legislature is not representative of and responsible to the people. The laws enacted by such a Legislature need not, therefore, be necessarily in conformity with the wishes of the citizens. In such a State, far from there being a harmony between the interests of the citizens and the interests of the State, there arises an antithesis. The interests of the State are the interests of a foreign country which endeavours to hold another country in domination; or the interests of a small body of men, a bureaucracy or an autocracy, which seeks to hold and perpetuate its authority over the country. There will thus be even in times of peace a perpetual conflict between the citizens on the one hand and the Executive exercising power under the direction of a State dominated by a foreign Government, on the other. The Executive will constantly strive to maintain the measures imposed by the State against the wishes of the citizens; and this will necessarily lead to conflicts between the Executive and the citizens. The State can maintain the governmental machine imposed by it against the wishes of the citizens only by controlling and restricting the fundamental liberties of the subject. There is, therefore, in such a State a constant endeavour on the one hand on the part of the State and the Executive to maintain and enforce the restrictions on the liberty of the subject with a view to maintain its authority and existence, and, on the other, an equally persistent effort by the citizens to shake off these controls and enlarge the enjoyment of their essential liberties. In such a State even in the normal times of peace the civil liberty of the citizen is a precarious and shadowy thing dependent entirely on the mercy of the Executive. The citizen is allowed by the Executive the enjoyment of these liberties only to the extent to which such enjoyment does not involve in the opinion of the Executive danger to the existence and carrying on of, what has been in India called, 'Government established by law.'

It is obvious that in States so governed, civil liberties, already precarious and slender in normal times, would in an emergency tend to become still more attenuated and restricted, if not, totally extinct. The 'Government established by law' will in such States have to face what may be called a dual crisis. The emergency of war against a foreign State will compel the State to put forth all its energy in order to fight the menace of external aggression and face what may be called the external crisis. At the same time, the Government not resting on the free will and consent of the citizens, the citizens will naturally take advantage of the emergency to shake off their fetters and to throw off this 'Government established by law.' That will be the internal crisis which the Government will be called upon to deal with. The Government, already in constant dread even in normal times of being overthrown, would be in greater danger of being exposed to an internal revolution in a time of emergency. It is not unnatural that the Executive faced with a dual crisis of this character should in such States try and arm itself in times of emergency with the widest and most arbitrary powers. It is equally natural that it should exercise these powers, not merely for the purpose of meeting the emergency arising from external danger to the State, as would happen in a national democratic State, but also utilize them with all the rigour which it can command against the citizens to maintain its very existence against the internal danger.

The story of emergency legislation in India and the manner in which the very wide powers under it have been exercised clearly demonstrate the correctness of this view.

XII. EMERGENCY LEGISLATION IN INDIA

The Provinces in India had at the commencement of the war attained a certain degree of autonomy and the citizen had the control of legislation in certain fields. There were in existence popular Legislatures in the Provinces under the Government of India Act, 1935, which made Provincial Governments responsible to and representative of the people in

a certain measure. The Central Legislature was however not a popular legislature; nor was the Government at the Centre responsible to the Legislature. Soon after the declaration of war, by reason of the conflict between the Government and the people, a large number of the popular Legislatures in the Provinces ceased to function. A major part of the popular element in the Central Legislature also kept aloof from that Legislature. In the result all checks which would normally exist against the assumption of extraordinary and arbitrary powers by the Executive in a time of emergency were absent. We had, therefore, the spectacle of the Executive taking to itself whatever powers it wanted without any check or control by a legislature representative of the people. The Governments that functioned at the Centre and in the majority of the Provinces were governments carried on by the Executive, uncontrolled and uninfluenced by representative legislatures or by the wishes of the citizens. In the circumstances it is not surprising that the wide and far-reaching powers assumed by the Executive on the arising of the emergency were exercised ruthlessly and in total disregard of the elementary liberties of the citizen. It was in effect the Executive who had promulgated these emergency laws both at the Centre and in the Provinces; and having enacted them the Executive revelled in enforcing them as they chose in total disregard of such public opinion as was allowed to find expression in the press and elsewhere.

The Governor-General declared under Section 102 of the Government of India Act that a grave emergency existed whereby the security of India was threatened; and, as a result, the power to make laws in the Provincial field was also vested in the Centre. Having thus obtained power over the whole legislative field, the Governor-General exercised it to its utmost in an arbitrary manner by making use of his power to issue Ordinances in case of emergency under Section 72 in the 9th Schedule to the Government of India Act, 1935. The Central Legislature, attenuated and unrepresentative as it was, was still functioning. But the Governor-General chose to ignore it altogether and enacted the bulk of emergency

legislation not through the normal channels but by resorting to his power to promulgate Ordinances. The Ordinances issued by the Governor-General under his emergency powers far exceeded in number the Acts enacted by the Central Legislature. We had two legislative authorities simultaneously functioning in the same field ; a phenomenon highly anomalous in Constitutional Law and one to which it would be difficult to find a parallel in any democratic country. In the circumstances it was inevitable that legislative measures should have been enacted giving the widest powers to the Executive, without any safeguards for the protection of the citizen, and that such liberty as the citizen enjoyed should have been destroyed in some spheres of his activity and gravely restricted in others.

On the outbreak of the war, the Governor-General in exercise of his emergency power of legislation by the promulgation of Ordinances enacted the Defence of India Ordinance, 1939 (Ordinance No. V of 1939). Soon afterwards this Ordinance was put before the Central Legislature and enacted as the Defence of India Act, 1939 (Act XXXV of 1939).

The Act was to be in force during the continuance of the war and for a period of six months thereafter. By section 2(1) of the Act, the Central Government was empowered to make 'such rules as appeared to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.' Sub-section (2) of section 2 provided that without prejudice to the generality of the powers conferred by sub-section (1), the rules may provide for, or may empower any authority to make orders providing for 'all or any of the matters enumerated in the sub-section.' Then followed an enumeration of various heads comprising every conceivable aspect of the life of the citizen. Sub-section (3) of section 2 conferred power on the Central Government to make rules conferring powers upon the Central Government or its officers and upon the Provincial Government and its officers. Sub-sections (4) and (5) enabled the Central and

the Provincial Governments by order to direct that any power or duty which by rule made under sub-section (1) was conferred or imposed upon these Governments may, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged by any officer or authority subordinate to these Governments. These sub-sections thus in effect enabled Government to entrust any officer or authority under them, however subordinate, with the exercise of all the powers and duties possessed by it under the rules. It is difficult to conceive of a power of delegation more extensive in its scope than the one contained in these sub-sections.

Section 3 provided that any order made under any rule made under Section 2 was to have effect notwithstanding anything inconsistent therewith which may be contained in any enactment other than the Defence of India Act. Section 14 of the Act provided that 'save as otherwise expressly provided by or under this Act, the ordinary criminal and civil Courts shall continue to exercise jurisdiction.' Thus in effect it enabled the Government in exercise of its power of making rules under the Act to deprive the civil and criminal Courts of the land of their ordinary powers. Section 16(1) of the Act provided that no order made in exercise of any power conferred by or under the Act was to be called in question in any Court. Section 17 conferred an indemnity in respect of acts 'in good faith done or intended to be done in pursuance of this Act or any rules made thereunder' by providing that no suit, prosecution or other legal proceeding was to lie against any person for such acts.

The Rules made under the Act were a large code touching and affecting all aspects of the life and activities of the citizen. One of the rules which has been widely availed of by the Executive for the promulgation of hundreds of orders and directions of a most drastic character was Rule 81(2) which enabled 'the Central Government or the Provincial Government so far as appears to it to be necessary or expedient for securing the defence of British India or the efficient prosecution of the war or for maintaining supplies and

services essential to the life of the community' to provide by order for a number of matters specified in the Rule. The matters so specified include, among others, the regulation or prohibition of 'the production, treatment, keeping, storage, movement, transport, distribution, disposal, acquisition, use or consumption of articles or things of any description whatsoever' and the prohibiting of or withholding from sale of articles generally or to specified persons or classes of persons and the control of the prices at which articles may be sold.

Rule 26 of these Rules enabled the Central or Provincial Government 'if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order ..... or the efficient prosecution of the war it is necessary so to do' to make an order directing that person to be detained, and conferred various other powers enabling the imposition of restrictions on the liberty of the person and movement of the citizen.

A provision that the notifications and directions made under the Act should be laid before the Legislature would have been of little value in the absence of a representative Legislature responsible to the people. But the Executive would not venture to submit its delegated legislation to the scrutiny of even this unrepresentative Legislature. All semblance of legislative form and procedure was discarded and the power of legislating in an emergency vested in the head of the Executive, the Governor-General, was freely exercised. That meant legislation by a small body of officials, the bureaucracy consisting of the heads of certain Departments. The wide powers of delegation conferred by the Act and by the Rules and Orders made under it from time to time were typical of the bureaucratic mind. The liberty of the citizen is generally a matter which weighs little with the Executive; and in an emergency the Executive is apt to believe that the drastic regulation of the life of the community necessary in emergency can best be effected by the conferring of large powers on the Executive. This tendency of the Executive to arrogate to itself the widest possible power is

accentuated when the Executive consists of a bureaucracy, accustomed even in normal times to impose their will and their measures upon the people.

The bureaucracy went to the extreme of enacting rules which would enable subordinate officers of the State to imperil the liberty of person of the citizen. Having regard to the system of Government prevailing in the country, it was inevitable that the powers to affect the liberty of the person, the liberty of association and the freedom of speech conferred by the Act and the rules in order to meet the emergency should very largely be exercised, not for the purposes of the emergency but to meet the internal situation in the country. Thousands of citizens were detained under Rule, 26, a large number of them being persons who were asking and agitating for the government of the country being allowed to be run by the people instead of by a bureaucracy controlled by a foreign Government. Detention under Rule 26 of numerous persons was effected at the sole discretion of subordinate officials who, it has been freely stated, were given numbers of orders of detention signed by superior officers with names left blank to be filled in as the subordinate officials liked. Indeed incidents occurred of deceased persons being attempted to be served with these orders, their names having at one time or other been on the black lists of the police. It is easy to realize that the entrustment of the exercise of powers so wide and arbitrary to an army of subordinate officials must result in grave abuse. There was, for some time, what has been described as 'a reign of terror' arising from the rule of the subordinate police and executive. Another inevitable consequence of these uncontrolled powers being entrusted to the Executive was the prevalence of a large amount of corruption in the administration and enforcement of these emergency laws. It can well be asserted that at no time in the history of the administration of India by the British has corruption reached the level to which it has attained in the administration of these emergency laws by the Executive.

Difficulties arose in regard to emergency legislation by reason of the practice, long prevalent in this country, of re-enacting without sufficient regard to the differing conditions and circumstances of this country legislation enacted in England. Section 2 of the Defence of India Act conferred a power to make rules which may appear to the Government to be necessary or expedient 'for securing the defence of British India, the public safety, ... or the efficient prosecution of war .....' The rules made also enabled powers to be exercised and orders to be made for these purposes. The words used were a reproduction with a little alteration of the language used in the English Emergency Powers (Defence) Act, 1939 (2 and 3 Geo. VI c. 62). The draftsman seemed, however, to have lost sight of the fact that the Indian Legislature was a subordinate legislature with its legislative power limited to the items mentioned in the Legislative Lists in the Schedule to the Government of India Act, 1935. Curiously enough those lists do not enumerate 'Defence of India' as a head of legislation, though Defence is mentioned as a subject of legislation in the Canadian and Australian Constitution Acts. A great deal of controversy arose over the validity of some of the Rules made under the Act and of the Act itself, it being contended that, in the absence of the necessary legislative power, the Act itself and the Rules made under it were invalid. It was not without some difficulty that the validity of the Act and the Rules was upheld by the Federal Court, which held that, notwithstanding the absence of the head 'Defence of India' in the Lists, 'entries in the Legislative Lists can be found which would justify legislation on most matters covered by the general words in Section 2(1) of the Defence of India Act as well as by the precise provisions set out in Sub-section (2) with its thirty-five paragraphs.' The Court was constrained to observe as follows:—

> The draftsman of Section 2(1) appears to have adopted the language of the Emergency Powers (Defence) Act, 1939, which has been passed by Parliament, not altogether happily, seeing that with the possible exception of 'the maintenance of public order,' none of the purposes

which he has set out are to be found under the same description among the matters comprised in the Legislative Lists.[33]

XIII. THE ABUSE OF THE POWER OF DETENTION

In an attempt to mitigate the ruthless rigour with which the emergency powers were exercised by the Administration the citizens turned for protection to the Courts; and the Writ of Habeas Corpus, embodied with some modifications in the Indian Statute Law, was sought to be availed of. The judgement of the Federal Court in Talpade's case[34] is a historic instance of the struggle by the Judiciary to save the citizen from the floods of arbitrary power that had been let loose by the Executive.

An authorized petition-writer on the Insolvency Side of the Bombay High Court was detained by the Government of Bombay under Rule 26. The Order recited that the Government was satisfied that, with a view to preventing him 'from acting in a manner prejudicial to the defence of British India, the public safety, the maintenance of public order and the efficient prosecution of the war,' it was necessary to make an order of detention against him. He adopted Habeas Corpus proceedings in the High Court at Bombay; but the High Court refused to interfere, following the decision in the Liversidge case. He then appealed to the Federal Court.

Section 2 (1) of the Defence of India Act empowered the Government to make such rules as appear to it to be necessary or expedient for the general purposes therein mentioned. Sub-section (2) provided that without prejudice to the generality of the powers conferred by Sub-section (1) 'the rules may provide for, or may empower any authority to make orders providing for' *inter alia* 'the apprehension and detention in custody of any person reasonably suspected of ..... having acted, acting or being about to act in a manner prejudicial to the public safety or interest or to the defence of British

33. *Keshav Talpade* v. *Emperor*, 6 F.L.J. p. 28 at pp. 36-37.
34. 6 F.L.J. p. 28.

India.' Rule 26 enacted under the rule making power empowered Government 'if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order, ...or the efficient prosecution of the war it is necessary so to do, may make an order' directing that such person be detained. It was contended on behalf of the subject that Rule 26 was not within the rule making power conferred by the Act, inasmuch as, while the rule making power spoke of the detention of a person who was 'reasonably suspected' of the various matters mentioned in Sub-clause (2) of Section 2, Rule 26 as framed enabled the Government to detain a person if it 'is satisfied' with respect to that person that his detention is necessary in the manner mentioned in the Rule. The Court considered the question whether the words 'reasonably suspected' implied the existence of suspicions for which there was resonable justification, and, whether the words of the Rule indicated that 'there must be suspicions which are reasonable in fact and not merely suspicions which some as yet unspecified person or authority might regard as reasonable.' The Court considered the Liversidge case[35] and pointed out the essential difference between the language of the English Regulation 18-B and Rule 26. It stated :

> There is nothing in the Act to prevent these powers being vested in any person or body, however insignificant or subordinate. It is one thing to confer a power to make a regulation empowering the Home Secretary to detain any person if he thinks it expedient to do so for a number of specified reasons ; it is another thing altogether to confer a similar power on any person whom the Central Government may by rule choose to select, or to whom the Central Government may by rule give powers for the purpose.

The Court further stated :

> They might take judicial notice of the fact that the number of the persons detained in India, compared to those in the United Kingdom, was very large and it was difficult to suppose

35. (1942) A.C. p. 206.

that the Governor-General in Council or the Governors with their advisers had always been able to give their personal attention to each case; so that the consideration of the facts must have been left in very many instances, to put it no higher, to officials, sometimes no doubt highly placed, but not necessarily so.

In the circumstances, and notwithstanding the decision of the House of Lords in the Liversidge case, the Court thought that the more natural construction of the words used in the rule making power was that there must be suspicions which are reasonable in fact and not such as the authority might regard as reasonable. The point was not, however, decided. The Court held that Rule 26 in the form in which it had been enacted went beyond the rule making power and was for that reason invalid. The position was stated thus:

The Act authorises the making of a rule for the detention of persons reasonably suspected of certain things; the Rule would enable the Central Government or any Provincial Government to detain a person about whom it need have no suspicions, reasonable or unreasonable, that he has acted, is acting or is about to act in any prejudicial manner at all. The Government has only to be satisfied that with a view to preventing him from acting in a particular way it is necessary to detain him.....There is no power to detain a person because the Government thinks that he may do some thing hereafter or because it may think that he is a man likely to do it; he must be a person about whom suspicions of the kind mentioned in the paragraph are reasonably entertained.

The Crown tried to rely on the wider rule making power contained in sub-clause (1) of Section 2. This argument was however rejected by the Court which held that it was not permissible to bring in aid the more general words in that sub-section in order to justify a rule which so plainly went beyond the specific power given in sub-section (2).

Considerations arising out of the emergency were fully weighed by the Court. The unjustifiable manner in which the Executive were exereising these emergency powers evoked a dignified but firm rebuke from the Court.

Though it is well to remember that, as was said in one of the judgements in a case before this Court some years ago, Courts of Law

ought to abstain from harsh and ungenerous criticism of acts done in good faith by those who bear the burden and responsibility of Government, especially in times of danger and crisis, we are not on that account relieved from the duty of seeing that the executive government does not seek to exercise powers in excess of those which the Legislature has thought to confer upon it, however drastic and far-reaching those powers may be and however great the emergency they are designed to meet.

The Court further said:

We may be forgiven for wondering whether a person who is described as an authorised petition writer on the Insolvency side of the Bombay High Court was really as dangerous a character as the recital of all these four grounds in the Order of detention suggests. The Order does nothing to remove the apprehension. We have already expressed that in many cases the persons in whom this grave power is vested may have had no opportunity of applying their minds to the facts of every case which comes before them.

XIV. THE STRUGGLE AGAINST ARBITRARY DETENTION

That judgement was an important landmark; it was probably the earliest of a series of attempts made by the Courts of Law in India to prevent the complete thwarting of civil liberties in India in the name and guise of the emergency which had arisen. That decision was of great help to the cause of civil liberty in India; and the weighty observations made in it were an echo, though a faint one, of the observations of Lord Atkin in his dissenting judgement in the Leversidge case. That judgement did proclaim to the world how the orders of detention contained merely mechanical recitals of the language of Rule 26, clearly indicating that in many cases, persons in whom were vested the great power of detention without trial hardly applied their minds to the facts of the cases which came before them. It was a clear and emphatic condemnation by the highest Court in the land, both of the terms in which Rule 26 had been enacted and the manner in which the powers under it had been exercised by the Executive.

The Executive under a system of responsible and representative government would have felt compelled to bow to this decision and to carry it out in spirit and substance. But the spirit of the decision and the observations of the Court

were entirely ignored by the Executive in India. They pretended to regard that judgement as being based on the discovery of a legal and technical defect in the Rule which they were entitled to set right. An Ordinance was enacted attempting to set right what the Executive had chosen to call a technical flaw. This Ordinance was enacted by the Governor-General, the Executive head, on the plea that an emergency had arisen. Were it not for the grim reality that Rule 26 and the various measures taken from time to time to maintain its arbitrariness had deprived thousands of citizens for an indefinite time of their personal liberty, one may confess to a sense of amusement at this so-called emergency. Far from respecting the decision of the highest Court in the land that the Rule was invalid and the detention under it of persons illegal, the Executive seemed to have considered that decision itself as having created an emergency; and the Executive firmly exercised its ordinance making power with a view to keep the illegally detained persons still in detention, entirely ignoring the spirit and substance of the decision of the Court. Such a course of action could be taken only under a régime entirely impervious to public opinion and to ideas of constitutional propriety.

The effect of this step on the subordinate executive and on the administration of justice generally was very grave indeed. The subordinate executive had a feeling that whatever the decision of the Courts, every action taken by them would stand ratified and validated by the Executive head and that nothing need retard them in the arbitrary exercise of their powers. This cursory and somewhat disrespectful treatment accorded to the decision of the highest tribunal in the land also tended to lower the prestige and dignity of Courts generally. Indeed, we had the unconstitutional and somewhat undignified spectacle of a Chief Justice of the High Court trying to teach the superior Federal Court its duties and to convince it that its decision in regard to Rule 26 was incorrect. It was inevitable that law and its administration by the Courts should greatly suffer in the estimation of the public.

The decision of the Federal Court that having regard to the specific power given in Sub-section (2) of Section 2 of the

Defence of India Act, it was not permissible to resort to the wider rule making power contained in Sub-clause (1) of that section to justify the terms of Rule 26, has since been overruled by the Privy Council.[36] This decision of the Privy Council, however, in no way diminishes the importance of the decision in Talpade's case in regard to the principles laid down by it or as upholding the cause of civil liberty.

Notwithstanding the validating Ordinance, there was still carried on in the Courts of Law, the only forum to which the people could look for redress against the Executive, a battle for the assertion of the right to personal freedom. One High Court declared the validating Ordinance to be invalid, whereas others decided the contrary. The matter came up again before the Federal Court. That Court released some of the persons detained, holding unanimously that Section 3 of the validating Ordinance was not invalid or *ultra vires*. It held, however, that it was a condition precedent to the valid exercise of the power of detention conferred by Rule 26 that the detaining authority should have applied its mind to the matter and have become satisfied that such detention was necessary for preventing persons proceeded against from acting prejudicially in respect of the matters mentioned in the rules. It further held that orders of detention made in pursuance of a general order that if the police recommended the detention of any person under Rule 26, such person may be detained, were invalid. As a result of that decision, the detention of a considerable number of persons became illegal. This, again, was an attempt by the highest Court in the land to limit and circumscribe the arbitrary exercise of the very wide power of detention conferred on the Executive.[37] An appeal from that decision was taken by the Crown to the Privy Council, in the case of some of the persons ordered to be released. But the

36. *Emperor* v. *Shib Nath Bannerji and Ors.*, (1945) VIII *F.L.J.* p. 222.

37. *King Emperor* v. *Shib Nath Bannerji* and other cases, (1943) 6 *F.L J.* p. 151.

Privy Council upheld the unanimous conclusion of the Federal Court in regard to some of the persons detained.[38]

These verdicts of the Federal Court had no effect on the Executive and the arbitrary exercise by it of the power of detention. It exercised its power of legislation by Ordinance and enacted an Ordinance called 'The Restriction and Detention Ordinance.' That Ordinance left unaffected the powers contained in Rule 26. It, however, provided that the persons detained were to be furnished by the Executive broadly the grounds for their detention, and were to have an opportunity of making a representation to the Executive with a view to convince the Executive that there was no valid ground for their detention. This provision, a pale shadow of the corresponding provision in Regulation 18-B in England, was entirely ineffective, and it gave no relief to the large number of persons under detention. Under its terms nothing more than the bare ground of detention had to be communicated to the person detained; and in the circumstances the right to put forward his case given to him was entirely illusory. Moreover, there was no provision enabling the person detained to obtain legal advice. And this rendered the right to make a representation useless. By this Ordinance, the Executive sought to trench itself deeper against interference by the Courts of Law by depriving the Courts of the powers analogous to the writ of Habeas Corpus enjoyed by them under Section 491 of the Criminal Procedure Code.

That, broadly speaking, is the manner in which the right to personal freedom has suffered in India by reason of the so-called emergency legislation. The wanton deprivation of the citizen of this elementary right under the pretext of necessity arising out of an emergency demonstrates that in a State governed by a bureaucracy, as India is, emergency legislation is a dangerous and double edged weapon which may be used as much to meet the real needs of the emergency as for sup-

38. *King Emperor* v. *Shib Nath Bannerji and Ors.*, (1945) VIII *F.L.J.* p. 222.

pressing the ordinary activities of the citizen which may be unwelcome to the bureaucratic Executive. The number of persons detained in India has been very large. Some figures as to the persons detained under the emergency power of detention have been from time to time furnished to Parliament and they show that the number ran into thousands. It can safely be said that the detention of the large majority of these persons has been made with a view to keep out of the way persons whose activities the Executive thought undesirable in the political field and that such detention had no relation whatever to the situation created by the emergency of war. It is remarkable that while in England immediately on the termination of the European War, every person detained was released, a large number of persons continued to be detained in India under these emergency powers months after the termination of the war in Europe and Asia.

XV. INTERFERENCE WITH JURISDICTION OF COURTS

Another important phase of emergency legislation in India was the enactment of an Ordinance encroaching upon the jurisdiction and powers of the lawfully constituted courts of the country. The Defence of India Act, enacted immediately at the commencement of the war, gave power to constitute Special Tribunals for the purpose of trying offences under the Act and certain other offences. A special procedure modifying the usual procedure of the courts was laid down for these Special Tribunals. These provisions were, however, not resorted to by the Executive. Instead, there was enacted early in 1942 an Ordinance called the Special Criminal Courts Ordinance (Ordinance No. 11 of 1942) making provision for the trial of offences by Special Courts. Curiously enough, the application of this Ordinance to any particular Province was left to the Provincial Government, who were to decide to put it into force on being satisfied of the existence of an emergency. Power was given by this Ordinance to the Provincial Governments to direct what cases or class of cases were to be tried by the Special Courts. The procedure provided for these Special Courts was a special procedure, and the rights of revi-

sion and appeal given by the ordinary law were rigorously cut down. By Section 26 of the Ordinance all authority in the High Courts to revise an order or sentence, or to transfer any case, or to make any order under Section 491 of the Criminal Procedure Code, and all their jurisdiction were excluded in respect of the proceedings of the Special Courts. The supervision and control of the High Court over the subordinate Judiciary arising from certain provisions of the Criminal Procedure Code, which invested the High Court with the means 'of putting a veto upon any proceeding unauthorized by the letter of the law' and in effect determine 'the whole relation of the Judicial Body to the Executive' were entirely removed.

These stringent provisions excluding recourse to the properly constituted Courts naturally raised a feeling of resentment in the public mind. The Courts of Justice alone had so far been able to afford some protection to the citizen against the ever rising tide of legislation restricting and abrogating the liberties of the citizen. The publicity of trial in a Court of Law, the right to be tried by assessors or a jury in certain cases, the right of appeal and the right of revision, the right to have the charges tried by Courts of a particular status, were all valuable rights of the citizen which enabled him to resist through the machinery of the Courts the encroachments of the Executive. The enactment of this Ordinance deprived the citizen of the protection afforded by these valuable rights.

Again the citizen adopted the only method left to him of combating the inroads of the Executive on his rights and liberties. He resorted to the ordinary Courts of the land, and challenged the validity of this Ordinance; and, in so far as the Courts in this country were concerned, he succeeded. A Full Bench of the Calcutta High Court declared a material provision of the Ordinance empowering a delegation to the Executive to decide the particular cases which should go for trial to the Special Courts invalid; and the decision of that High Court was affirmed by a majority of the Federal Court.

The majority decision of the Federal Court expressed its views on the provisions excluding the jurisdiction of the Courts and the manner in which generally emergency legisla-

tion was enacted in this country in no uncertain terms. The Acting Chief Justice expressed himself in these words:

> It is not without reason that for more than three quarters of a century it has been found necessary and proper to keep the revisional powers of the High Court under the Criminal Procedure Code much wider than the revisional powers under the Civil Procedure Code. Apart from the importance of safeguarding the life and liberty of the subject, the difficult position of the magistracy in this country demands it, as much in the permanent interests of the magistracy itself as in the interests of the citizen. Those who were familiar with the pages of the Indian Law Reports know how this revisional power has justified itself. But as has been frequently pointed out, the existence of this power even in reserve is a potent and wholesome influence, apart from its actual exercise.

The Court was reminded on behalf of the Crown that the way in which the High Court's powers had been dealt with in the Ordinance was a question of policy with which the Court was not concerned. In reply, the Court pointed out that the circumstance that the legislation in question had been enacted by an Ordinance raised an important question. It stated that though legislation by Ordinance had been given the same effect as ordinary legislation and though the ambit as to the subject-matter was the same in both cases, there are two fundamental points of difference between the two. By the very terms of the section authorizing the enactment of Ordinances their operation was limited to a certain period of time, and the Ordinances were avowedly made in the exercise of a special power intended to meet an emergency. In the opinon of the Court these two circumstances differentiated legislation by Ordinance from normal legislation and afforded ground for doubting the applicability of the principle of plenary powers laid down in *Queen* v. *Burah*[39] to Ordinances. It was pointed out that the very conception underlying the Ordinance-making power so connected it with the personal judgement and discretion of the Governor-General that the objection against delegation to subordinate executive authorities of any matter of principle as was attempted to be done in the Ordinance before them, was very serious.

39. (1878) Law Repts. 3 App. Cas. p. 889.

It was pressed on behalf of the Crown that it was necessary that there should be some authority in the State in a position to enact necessary measures to meet extraordinary contingencies. Dealing with that contention the Court stated :—

> Section 72 of the Ninth Schedule makes ample provision for it; the question is about the manner of exercising that power. Before applying the analogy based on the English practice as to emergency legislation, certain differentiating circumstances must be borne in mind. In England even the emergency legislation is parliamentary legislation or Order in Council passed under the authority of parliamentary statute and it is always subject to parliamentary control, including in the last resort the right to insist on the annulment or modification of the Order in Council or even the repeal or modification of the statute itself. Under the Indian Constitution, the Legislature has no share in or control over the making of an Ordinance or the exercise of powers thereunder, nor has it any voice in asking for its repeal or modification. Again anything like a serious excess in the use of special emergency powers will, under the English practice, be a matter which Parliament can take note of when the time comes for passing the usual indemnity Act on the termination of the emergency (see Dicey's *Law of the Constitution*, page 236, and Carr's *Administrative Law*, pages 69 and 70). That is not the position here, as the indemnity can be provided by an Ordinance. As against all this, the only safeguard provided in the Indian Constitution is that the matter rests entirely upon the responsibility of the Governor-General. This only confirms the argument against delegation of such a responsibility at least without laying down in clear and definite terms the limits and conditions governing the exercise by executive officers of powers conferred upon them by the Ordinance. Today, in India, the situation is complicated by the fact that when large and undefined powers are entrusted to Provincial Governments and their executive officers, the constitutional limitations, conventions and etiquette implied in the theory of provincial autonomy make it difficult even for the authority promulgating the Ordinance to interfere to check the improper use of such powers.[40]

The main attack against the Ordinance was based on its provisions which left to the Executive the sole power to decide which case or group or class of cases should be withdrawn from the purview of the ordinary Courts and committed to

40. *Emperor* v. *Benoari Lal Sarma and others*, (1943) 6 F.L.J., p. 79 at p. 117.

trial by the Special Courts constituted by the Ordinance. It was contended that this course was open to objection as having left the exercise of the power thereby conferred on executive officers with an absolute and unrestricted discretion, without any legislative provision or direction laying down the policy or conditions with reference to which that power is to be exercised. Dealing with this aspect of the matter the Court said :

A comparative study of the Ordinances promulgated by the Governor-General during the last two decades will reveal a progressive diminution in the definiteness and completeness of the relevant legislative provision and a corresponding extension of the limits of executive intervention in the determination of the forum and the procedure applicable. The earlier Ordinances were limited to defined categories of crimes with reference to their nature, time, place or purpose and the choice of the forum even in such cases was left to the Governor-General or to the Government to make. The practice has now been extended to *all* offences and the choice of the forum (with all its serious consequences under the present Ordinance) has been entrusted to any servant of the Crown who may be authorised by the Provincial Government.....

As we have already observed, the considerations and safeguards suggested in the foregoing passages may be no more than considerations of policy or expediency under the English Constitution. But under constitutions like the Indian and the American, where the constitutionality of legislation is examinable in a court of law, these considerations are, in our opinion, an integral and essential part of the limitation on the extent of delegation of responsibility by the legislature to the Executive. In the present case, it is impossible to deny that the ordinance-making authority has wholly evaded the responsibility of laying down any rules or conditions or even enunciating the policy with reference to which cases are to be assigned to the ordinary criminal courts and to the Special Courts respectively and left the whole matter to the unguided and uncontrolled action of the executive authorities. This is not a criticism of the policy of the law—as counsel for the Crown would make it appear—but a complaint that the law has laid down no policy or principle to guide and control the exercise of the undefined powers entrusted to the executive authorities by Sections 5, 10 and 16 of the Ordinance.[41]

41. *Emperor* v. *Benoari Lal Sarma and others,* (1943) 6 *F.L.J.* p. 79 at p. 118.

While the majority judgement thus strove in the traditional manner to uphold the liberties of the subject, the minority judgement struck the familiar note that the Courts were not concerned with matters of policy but only with the interpretation of the law as it stood. It stated :

> But, it is not for us to concern ourselves with policy where the law is clear but to give effect to its provisions however injurious we may conceive the consequences to be, and I shall confine myself to considering the law without further reference to its consequences.[42]

This was indeed a serious comment on the provisions contained in the Ordinance.

As a result of this decision, the Special Courts Ordinance was repealed, and provision was made for a review of the sentence passed by the Special Courts. Persons, whose sentences still remained unexpired, or persons, who still remained to be tried by the Special Courts, obtained the benefit of an appeal to, or a trial by, the ordinary Courts.

XVI. THE SPECIAL COURTS

Notwithstanding the repeal, the Executive, determined to uphold and retain the widest legislative and executive power to itself, appealed to the Privy Council. It was recognized by the Privy Council that in view of the repeal of the Ordinance the question argued before them was largely academic.

> But in view of the elaborate argument that has been taken place and the way in which that topic has been dealt with in the judgements in India, their Lordships think that the better course is to decide the question whether Ordinance II is invalid, especially as this may be of assistance in deciding other questions which may arise thereafter as to the validity of the Ordinances made, in cases of emergency, by the Governor-General under the authority of Section 317 and para 72 of the 9th schedule of the Government of India Act, 1935.[43]

42. *Emperor* v. *Benoari Lal Sarma and others,* (1943) 6 F.L.J. p. 79 at p. 134.

43. *King Emperor* v. *Benoari Lal Sarma and others,* (1945) 8 F.L.J. p. 1 at p. 2.

The broad view of the majority of the Federal Court, based upon the peculiarity of conditions in India and the difference between the Constitution of this country and of Britain, was negatived by the Privy Council. One cannot help remarking that the Privy Council failed to approach the question from the point of view of Indian conditions, and the peculiar position of the Executive in India, and restricted themselves to a bare interpretation of the mere letter of the statute. Adverting to the reference to constitutional principles made in the majority judgement of the Federal Court, the Privy Council stated:

> With the greatest respect to these eminent judges, their Lordships feel bound to point out that the question whether the Ordinance is *intra vires* or *ultra vires* does not depend on considerations of jurisprudence or policy. It depends simply on examining the language of the Government of India Act and of comparing the legislative authority conferred on the Governor-General with the provisions of the Ordinance by which he is purporting to exercise that authority. It may be that, as a matter of wise and well framed legislation, it is better if circumstances permit to frame a statute in such a way that the offender may know in advance before what court he will be brought if he is charged with a given crime : but that is a question of policy not of law. There is nothing of which their Lordships are aware in the Indian Constitution to render invalid a statute, whether passed by the Central Legislature or under the Governor-General's emergency powers, which does not accord with this principle..... Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results injurious or otherwise, which may follow from giving effect to the language used. The learned judges who were in the majority in the Federal Court would presumably not contest this proposition, and their Lordships rather understand their view to be based on the conception that there is something underlying the written Constitution of India which debars the Executive Authority, though specially authorized by the statute or ordinance to do so, from giving direction after the accused had been arrested and charged with crime as to the choice of the Court which is to try him. Their Lordships are unable to find that any such constitutional limitation is imposed.[44]

44. *King Emperor* v. *Benoari Lal Sarma and others,* (1945) 8 F.L.J. p. 1 at p. 87.

That judgement of the Privy Council has been widely criticized; it has even been characterized as a judgement based on considerations of policy. It can certainly be said that the judgement of their Lordships fails truly to appreciate the majority judgement of the Federal Court and to do justice to it. A writer in the *Law Quarterly Review* referring to the Privy Council judgement stated that 'most constitutional lawyers would sympathize with the objections of the eminent judges in India to the provisions of the Ordinance in question. Delegation of such powers to the Executive may well be considered to be contrary to constitutional principles. An appeal to constitutional principles frequently deters Parliament from enacting some proposed provision of an Act of Parliament. Constitutional principles are, however, only guides to the Legislature and not principles of law.'[45]

In India the judgement of the Privy Council has evoked scathing comment, of which a typical one may be reproduced:

> In particular we may observe that in matters of this kind, more than any other, English analogies are perfectly useless. The position in India is not the same as in England. In England, the authorities making the emergency legislation are in office by the will of the people and if in the exercise of their judgement they delegate certain powers to the Executive, that is a judgement which the people must be deemed to trust or to be continually trusting. But for such trust, the authorities could not remain in office for a moment. Again, the Government being one of the people and by the people, the interests and the outlook of the Government are necessarily the same as the people's and all emergency legislation is designed to subserve that identical interest. The position in India is, for political reasons, entirely different and India of the Indian people and the British Empire in India are entirely different things. Having no real share or interest in the government of the country which is the privilege and concern of others, the only matter of the several factors involved in peace, order and good government in which the people of India have a personal, real and not a mere notional interest is their civil liberty. They have therefore a vital interest in seeing that this single item of the rights of citizenship which they enjoy is controlled by valid laws and that if it is encroached upon by governmental authorities by means of emergency enactments made

45. *Law Quarterly Review*, Vol. 61, p. 123.

for reasons known to and knowable by them alone and by them considered sufficient, such enactments may be strictly with the letter of the legislative authority conferred by the Constitution Act. Analogies drawn from a country where the Legislature is not bound by any limitations of any kind and where the people are naturally not too critical of emergency laws passed by authorities whom they have themselves placed in power to safeguard and advance their common interests have no bearing whatever on Indian problems of the validity of an Ordinance. The principles which might be conceded in interpreting the scope or examining the validity of emergency legislation in England cannot, for obvious reasons, be conceded in India. Here, preservation of the rule of the normal law is a matter for particular and perpetual anxiety of the people; and circumstances make it their peculiar concern to insist that the Executive should be kept at as great a distance as possible from the Legislature and the Judiciary and that the specific power to make Ordinances given by the Constitution Act shall not in the slightest degree be exceeded.[46]

This comment emphasizes the difference between the problems arising in connexion with the protection and preservation of civil liberties in countries ruled by an autocracy or a bureaucracy from those arising in regard to civil liberties in countries under governments functioning under a democracy.

Colonial writers on Constitutional Law have on occasions characterized judgements of the Privy Council as having been influenced by considerations of policy. It is not surprising therefore that similar comments should have been made in regard to the view taken by the Privy Council in Benoari Lal Sarma's case.

Whatever the true legal view, the stand taken by the Federal Court has proved to be a valuable aid in the preservation of the fundamental right of the Indian people to have recourse to the ordinary courts of the country.

The aversion of the people to the Special Courts erected under the repealed Ordinance was not without justification. It has not been possible to obtain accurate information to

46. *Calcutta Weekly Notes*, Vol. 49, 22 January, 1945, p. 18.

enable one to form a judgement of the way in which the Special Courts as a whole functioned. Some of the cases tried by these Courts have, however, come in appeal before the ordinary Courts; and the records of these proceedings leave no room for doubt that a large number of persons tried by these Special Courts did not receive a proper judicial trial. In a number of cases the convictions made by these Special Courts have been set aside, it being held that these were based on material which was not legal evidence. It is not possible to form any idea as to the number of persons tried and convicted by these Special Courts; and the sentences passed in a large number of cases tried by these Courts have not come up for examination by the ordinary tribunals. But, considering the matters which have so come up, it can, I think, be asserted that a large majority of the persons tried and convicted by these Special Courts under their special procedure were denied the right of a satisfactory judicial investigation of the charges laid against them.

XVII. THE EXECUTIVE AND COURTS

It is necessary to advert to the attitude which the Executive has in general maintained in regard to the ordinary Courts in the land. Every effort has been made to restrict and circumscribe the powers of these Courts by emergency legislation, which has in this country been enacted largely by Executive fiat. In so far as these efforts have not succeeded, and the Courts have pronounced the action of the Executive to be invalid and improper, the Executive has set at naught the pronouncements of the Courts and sought to obtain again, by the exercise of the powers of Ordinance legislation vested in it, the same or wider powers. What is more, even the superior Courts have been subjected to the indignity of seeing persons acquitted by them after a laborious trial, pounced upon and seized by the police, sometimes in the Court-room itself or in the precincts of the Court-house, and taken again into detention.

Respect for law and its administration are essential elements making for the stability of government and the

ordered progress of society. The dignity of the law and the tribunals administering it have therefore been insisted upon in all civilized jurisprudence. The powers that be in India seem, however, to be entirely oblivious of these considerations. Can a citizen have any respect for the law, when a law pronounced by the Courts to be invalid is validated in a few hours time at the will of the Executive? And what respect can the citizen have for the authority of legal tribunals, if persons pronounced by them after a laborious trial to be innocent are immediately after such pronouncement taken into detention again in the exercise of executive powers? The action of the Executive in India had almost the appearance of playing with the Courts of law. Their conduct seemed to indicate that in several cases they merely took the chance of securing a further detention of a person at the hands of the Court of Law. If they could secure a conviction, the further detention could be attributed to the finding of the Court. But, if the prosecution failed, and the judge pronounced the accused innocent, that verdict would not prevent the Executive in the exercise of their powers from making a further order of detention. This disrespect shown by the Executive to legal tribunals has greatly undermined respect for law and the administration of justice generally in the minds of the ordinary citizen.

Most of the Ordinances enacted in the exercise of the emergency powers have specifically enacted that no order made or action taken under them shall be called in question in any Court. It has also been provided that 'no suit prosecution or other legal proceeding shall be instituted in any court in respect of anything in good faith done or intended to be done under this Ordinance.'[47] In some cases the provision is even wider, it being enacted that 'no suit, prosecution or other legal proceeding shall lie against any person *for anything done* or in good faith intended to be done under this Ordinance'.[48]

47. Section 16 of the Hoarding and Profiteering Prevention Ordinance, 1943 (XXXV of 1943).

48. Section 15 of the Sugar (Temporary) Excise Duty Ordinance, 1943 (XLI of 1943).

These provisions have made it difficult, if not impossible, to challenge the act of the Executive in Courts of law. Attempts made to establish want of good faith in actions taken by the Executive have failed in India, as they did in England. Moreover, the protection afforded to 'anything done' under some of the Ordinances confers an absolute immunity and altogether prevents any action being questioned in Courts of law. It may therefore be said that emergency legislation in India has been so framed as to substantially prevent interference by the Courts with the Executive and to make a challenge of their action as *ultra vires* very difficult, if not impossible.

XVIII. EMERGENCY LEGISLATION REGARDING RIGHTS TO PROPERTY AND FREEDOM OF TRADE

We have so far reviewed the manner in which emergency legislation has affected the right of personal freedom of the citizen in India. As in every other country, emergency legislation in India has also widely affected the rights of enjoyment of property and freedom of trade.

The requisitioning of property, both movable and immovable, has been expressly provided for in the Defence Regulations. These provisions have, however, been challenged as being *ultra vires* of the legislative powers mentioned in the Schedule to the Government of India Act. This has led to conflicting decisions by the different High Courts. The Bombay Court recently took the view that the rule enabling requisitioning of immovable property was *ultra vires* the Central Legislature. The Calcutta Court has held that Rule 75A of the Defence of India Rules, in so far as it authorizes requisitioning of movable property, is within the legislative head 'public order'.

Apart, however, from the validity of the provisions, the nature of the provision itself and the manner in which it has been worked have created great hardships. In England the by-laws made provision for payment of just compensation to the owner of movable property requisitioned under the Defence Regulations. The owner became entitled to the fair market value of the property. In India Rule 75A (4) of the Defence

of India Rules, which deals with compensation in regard to movable property requisitioned or acquired by Government, provides that 'the owner thereof shall be paid such compensation as the Government may determine.' No method or standard for the assessment of the compensation has been provided. The claimant is in the matter of compensation entirely at the mercy of the particular government official or department entrusted with the duty of fixing the compensation. This duty is generally assigned to individual officers, subject no doubt to the direction of his superiors. Movable property of various kinds has been acquired all over the country, and, there being no standard laid down for the assessment of compensation payable, amounts, sometimes absurdly low and sometimes fantastically high, have been awarded as and by way of compensation. The manner in which the Legislature has left the matter to be worked out has also left the door open for corruption. The owner being not of right entitled to the fair market value of the property is apt to use very undesirable methods for obtaining as high an amount for his property as he could persuade the officer to fix.

Control over various trades and occupations has been exercised by the issue of orders and notifications under the Rules providing, among other things, for the issue of licences for the carrying on of trades and occupations. In licences issued under these orders and notifications clauses were added by amendments subsequently made giving the Provincial Government power, without giving any previous notice and without assigning any reason, to suspend or cancel a licence or class of licence granted under the notifications.[49] And it was provided that the holder of the licence was to be entitled to no compensation for the cancellation or suspension of his licence, or even to a refund of the fee paid in respect thereof. The provision, the validity of which has been doubted, has

49. Clause 5 of the Cotton Cloth and Yarn (Control) Order of 1942.

been enacted in complete opposition to the basic principles of natural justice. The licensee, having laid out expenditure in the matter of the licence and his trade, it is but fair that before he is deprived of his licence he should have a right to be told the reason of the deprivation and to be heard in respect of the undesirable practice charged against him, by reason of which it is intended to deprive him of it. However, the elementary principles of natural justice do not appear to have troubled the Executive. A large number of licences granted before the enactment of the deprivation clause, and therefore not subject to it, have been revoked by the Provincial Governments in total disregard of the rights of the licensees rendering in some cases the carrying on of very old businesses impossible and depriving traders of their living.

That, in brief, is a sketch of the working of emergency legislation in India. It will be noticed that that legislation has left much wider powers to the Executive than the corresponding legislation in England. We have therefore more arbitrary and more drastic powers entrusted to an Executive working under a Government not controlled by, and not representative of, the people. The results have been a ruthless suppression of the civil liberties of the citizen, in many cases for purposes having no relation to the emergency, a tyrannous exercise of arbitrary power by an army of subordinate officials, and a rampant corruption in numerous branches of the public service.

XIX. DELEGATED LEGISLATION

Emergency legislation in all countries has provided for delegation and sub-delegation of both law-making and adjudicatory functions on an extensive scale. There has been a manifold increase of what has been compendiously called 'Administrative Law;' and this wide delegation in both these spheres has been severely criticized.

Delegation is, however, not a feature peculiar to emergency legislation, nor is it of recent growth. Delegation in the sense of the entrustment to local or subordinate depu-

ties of powers, which would normally be exercised by central Government Authority, was known from the earliest times. As far back as the fourteenth century, the Statute of Proclamations gave to the King in Council power to issue proclamations, which were to have the same force as the Acts of Parliament, in anticipation of the modern form of enactment which gives regulations the same legislative force 'as if enacted in the Act.' It can fairly be said that there has been in England 'the continuous tradition of the delegation of powers, though developed unevenly in different ages; and it is to the nineteenth century that its great and rapid extension belongs.'[50] That was a period of bold and strong measures of reform which touched many aspects of social life. It witnessed a huge and varied mass of constructive legislation in the fields of public health, education, local self-government, company law, criminal law, and judicature and procedure. With this vast mass of legislation and the different fields it covered, delegation grew largely in volume. Indeed, one finds instances of delegation of power to subordinate authorities empowering them to alter or dispense with minor provisions of various statutes.

While there was a division of opinion among Constitutional writers in regard to the desirability of this extensive delegation, the Judiciary expressed itself strongly against it. This is shown by a number of judgements which protested against the attempts made by the Executive in the exercise of delegated powers to prevent proceedings being brought before the Courts where real points of difficulty requiring judicial interpretation had arisen.

Notwithstanding, however, this disfavour shown by the Judiciary, the volume of delegated legislation grew apace. The complexities of modern life and the growing needs of industry and industrial organization made the growth of delegation inevitable. Parliament had in the eighteenth century to cope with the arduous work of enacting long and complicated legis-

50. C. K. Allen, *Law and Orders*, p. 23.

lation in regard to various aspects of social and industrial life. And, as time passed, this task became more and more arduous. In the circumstances it could only itself frame broad and general principles of law, leaving its legislative application in detail to administrative bodies and executive officers.

The doctrine of the separation of powers finds a place in the Federal Constitution of the United States. A rigid adherence to this doctrine of the separation of legislative, executive and judicial power must necessarily exclude all delegation of legislative power to the Executive. Indeed, it has been laid down in one of the decisions in the States that ' "the Congress cannot delegate legislative power to the President" is a principle universally recognized as vital to the integrity and maintenance of the system of Government ordained by the Constitution.' [51] Notwithstanding this view and others equally emphatic, delegated legislation has also been greatly in vogue in the United States. Chief Justice Hughes recognized the necessity of delegated legislation in the following words in his opinion in the Panama Refining Company's case : —

> Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the National Legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources to flexibility and practicability which would enable it to perform its function in laying down policies and establishing standards, while leaving to select the instrumentalities of the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its assertion could be but a futility.

XX. SAFEGUARDS IN RESPECT OF DELEGATED LEGISLATION

The flood of delegated legislation, which came into existence during the Great War of 1914-18 and after it, was viewed

51. *Wichita Railroad and Light Company* v. *Public Utilities Commission of Kansas*, 260 U.S. 48.

with considerable alarm, and, led to the appointment of the Committee on Ministers' Powers in order to consider the powers exercised by way of delegated legislation or by way of a judicial or quasi-judicial decision, and to report upon safeguards necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law. The Committee, which consisted of Members of the House of Commons, practising lawyers and civil servants of experience, reported that the system of delegation was indispensable and inevitable. The conclusion reached was that the system was 'both legitimate and constitutional and desirable for certain purposes, within certain limits and under certain safeguards.' It was hardly to be expected that the conclusion could be different having regard to the impossibility of an Assembly like the House of Commons being able to keep pace with the multitudinous and detailed legislation which forms the subject-matter of departmental rules and by-laws.

It is useful to remember that the Committee's approval of delegated legislation was qualified by the recommendation that special vigilance should be exercised over particular types of legislation. The Committee named among these: legislation on matters of principle; legislation imposing taxation; legislation conferring authority to alter statutes; and legislation leaving it to the Executive to decide the date as to the commencement of operations of statutes passed by Parliament. The Committee were also very critical of legislation which tended to prevent the validity and scope of departmental and administrative rules being tested in Courts of law.

Sir Cecil Thomas Carr, who has made a special study of Administrative Law and Administrative Tribunals, while fully accepting the necessity and desirability of delegated legislation, has laid down certain safeguards which may be observed in enacting it. These safeguards have been summarized by him in his Lectures on Administrative Law published in 1941.[52] The first requirement mentioned by him is

52. Sir Cecil Thomas Carr, *Concerning English Administrative Law.*

that 'the delegation should be to a trustworthy authority commanding the national confidence.' Omission of this vital safeguard in respect of some of the regulations has been commented upon in England and its virtual abandonment in India has led to an arbitrary exercise of powers by the subordinate officials. A further safeguard laid down by him was 'that the limits within which the delegated power is to be exercised ought to be definitely laid down.' What he suggested was that the control by the Law Court should be made as easy as possible, and, that the rule-making authority should be obliged to state in the rules the exact statutory power which it purported to be exercising when making the rules. A further recommendation by him was 'the prior consultation of interests specially affected.' Such consultation would put the rule-making authority into complete possession of the points of view of the persons sought to be affected by the rules. And rules enacted after such consultation would naturally work smoothly and without any opposition from the interests concerned. He also stressed 'publicity'. Publicity in official gazettes dealing specially with delegated legislation would make such legislation easy of access and knowledge to the public concerned. And such knowledge would necessarily result in the delegated legislation being subjected to the watchful and vigilant eye of the public concerned.

The Committee on Ministers' Powers was equally emphatic about the necessity, utility and indispensability of what have been called 'Administrative Tribunals.' It, however, recommended that 'future legislation should allow any one who was aggrieved by the decision of a minister or ministerial tribunal to have an absolute right of appeal to the law courts on any point of law but no right of appeal on any issue of fact.' It also suggested that appeal to courts of law should be permitted on some questions of fact in regard to certain exceptional kinds of legislation. That of course would open up the interminable controversy as to what constitutes a point of law as distinguished from a question of fact. As to the procedure before these tribunals, it is obvious that the method followed in courts of law would not be appropriate. But that

should not prevent the application by them of the rules of natural justice. The first broad rule of natural justice is that the adjudicating authority must not itself be interested in the decision. In other words, that it must not be a judge in its own cause. The second fundamental rule is that no party is to be condemned unheard and every party must know the points he has to meet and must have a full opportunity of being heard on these points. A further rule referred to by the Committee was that a party is entitled to know the reasons for the decision for or against him. Finally, they dealt with the important question of a judicial review of the decision of these tribunals.

XXI. SAFEGUARDS IN TIMES OF EMERGENCY

We have so far been discussing safeguards in respect of delegated legislation in normal times of peace. These are, however, of equal importance to such legislation in times of emergency. Indeed, few of them are such that they cannot be maintained even in times of emergency without interfering with the urgency of the exercise of legislative powers in such times. If it is necessary in normal times to make the delegation to an authority commanding confidence, the necessity of such a course is the more imperative in times of emergency when the powers to be exercised would be far greater, and would interfere with every aspect of national life. This would necessarily involve a strict limitation of the extent of what has been called sub-delegation. If it is intended that the authority to whom a delegation is made should be competent to make a further delegation of its function, the legislative authority should specify the bodies or officers to whom such sub-delegation could be made, taking care to see that they are bodies or officers in whom trust can be reposed. Only by adopting that course could one avoid an army of subordinate officials exercising very arbitrary powers. A further limitation to delegation, whether legislative or executive, may be the imposition of conditions to the exercise of the delegated powers by the authority to which the delegation is made. These conditions may in appropriate cases be objec-

tive, so that the power is to be exercised only in the event of certain facts being ascertained to exist. However, in cases of real emergency the conditions may well be 'subjective conditions.' As, in the case of a subjective condition, the opinion or belief of the authority would, in the absence of want of *bona fides,* be conclusive, the authority to whom delegation is made will have to be fully worthy of the confidence to be reposed in him.

A safeguard of no small importance would be the provision that by-laws and regulations made under delegated powers should be submitted to the legislative body for its approval. Lest this may occasion delay in times of emergency, provision may be made, as has been done in the case of some emergency legislation, that the regulations should, before becoming effective, lie on the table of the House for a certain number of days, and, in the absence of disapproval being expressed, they should take effect after the lapse of time. It may be that when a mass of regulations are enacted in the exercise of delegated power, very little effective check would be capable of being exercised by the regulations being merely laid on the table. But experience has shown that regulations of a manifestly arbitrary character have on occasions, by reason of their being laid before the legislative body, been either modified or recast. In any event such a procedure will prevent these regulations falling into a kind of oblivion so far as the ultimate legislative authority is concerned; it could not then be said that the legislative authority was wholly unaware of the volume, extent and nature of the regulations made under its delegated authority.

A useful procedure in this connexion, particularly in times of emergency, may be the appointment of a Committee of the House, whose special function would be to scrutinize from time to time by-laws, regulations and notifications laid on the table of the House from time to time. This course will have the advantage of regulations requiring recasting or modifications being brought to the notice of the House from time to time by a body charged with this duty rather than by individual Members of the House, who may chance to devote their

time to them. A Standing Committee of this character was one of the suggestions made by the Committee on Ministers' Powers.

The enactment of definite and precise limits to the delegated power is of the utmost importance, and there should be no difficulty in ensuring this safeguard being maintained in times of emergency. While giving to the authority, to whom delegation is made, the fullest scope within a certain ambit, it is but proper that the ambit should be clearly and strictly prescribed. Such clear definition would, instead of hampering the authority, enable it to act freely and easily within a well defined sphere and prevent the enactment of regulations and by-laws in vague and general terms.

The publicity of delegated legislation is also of vital importance. The utility of such publicity is two-fold. It would act as a preventive to the enactment of wide and unnecessary regulations by reason of the public criticism which they would invite if they are published so as to become known to the public. Such publicity would also serve the purpose of making delegated legislation easily accessible to the public, who having become aware of it would be better able to conform to it. We have already noticed how difficult it has been for the citizen in times of emergency to keep within the law for the simple reason that he does not know of numerous prohibitions and restrictions enacted by delegated legislation.

A cognate subject is the drafting of these statutory regulations and orders. One has only to study the numerous orders and notifications issued from time to time by various departments to see not only the inelegance, but the inconsistencies of the language used, so that great difficulties have been felt in construing them even by experienced judges. The remedy clearly lies in providing a department, whose special business it would be to draft all departmental regulations and orders. This would prevent the turning out of orders by a process of mass production, and prevent the difficulties which have arisen by reason of the adoption of this process. This procedure may perhaps result in a little delay.

But the time and care spent initially over drafting these regulations and orders will be more than repaid by the saving of the time that is now taken up in explaining difficulties which arise when making necessary amendments and in issuing fresh orders and notifications. Further, properly drafted regulations and orders will prevent a great many matters being brought up before the Magistrates and Courts.

The justification for legislative delegation must rest on the difficulty of a large legislative assembly in dealing with complex matters of detail. It must confine itself to laying down the broad principles leaving the details to be worked out by the Executive. Accepting this principle, legislation empowering delegation must see that what is left to enact by delegation to the Executive is in substance and fact matters of detail giving effect to the principles laid down by the Legislature and not legislation on matters of principle. What has too often been done is to leave the principle to be legislated upon by the delegated authority and not merely the application of the principle in particular matters by detailed regulations and rules.

In some delegated legislation not only has power been given to legislate on matters of principle, but the Legislature has gone much further. It has actually empowered the delegated authority to legislate so as to abrogate existing legislation. This is clearly empowering the delegated authority to usurp the true legislative function which must always rest in the Legislature selected by, and representative of, the people.

In exercise of these wide powers the delegated authorities have in many cases excluded the operation of important laws making for the freedom of the person and property of the subject. In the result it has happened that, on occasions, in the course of delegated legislation, regulations have been enacted which have the effect of abrogating laws affecting the ordinary right of the citizen to have recourse to law for the redress of his grievances, whether in respect of his person or property.

We have so far referred to delegated legislative functions. In regard to the delegation of judicial or quasi-judicial functions to the Executive, it is essential that care should be taken to name the delegated authority and select an authority who would command the confidence of the public. Wherever possible steps should be taken to associate with the adjudicating authority some person with a judicial training, or, at any rate, provide a method of review of the decision of the Executive by some judicial authority in whom the public could have confidence. Further, even in cases where the deciding authority is solely the Executive, the legislation providing for delegation should expressly provide the procedure to be followed incorporating in it broadly the rules of natural justice which involve knowledge by the person concerned of the allegations with which he has to deal, and a reasonable opportunity of being heard in respect of such allegations, and finally the knowledge in him of the reasons for the decision given concerning him.

XXII. SAFEGUARDS IN RESPECT OF EMERGENCY LEGISLATION GENERALLY

We have so far dealt with safeguards which may be provided by the legislative authority in respect of the delegation of legislative and adjudicatory functions. However, apart from legislation by delegated authority, there has been in times of emergency a great deal of legislation by the Legislature itself which has largely impinged on the liberties of the citizen. Dealing with such legislation broadly, it can be urged that the needs of the emergency can be adequately met notwithstanding the provision in such legislation of adequate safeguards which would protect the citizen against arbitrary action by the Executive. It has to be remembered that in a time of emergency the Executive is naturally wholly prepossessed in favour of the need of taking immediate and drastic action, so that it is difficult for it to appreciate and appraise the citizen's point of view on many matters on which it thinks immediate action imperative and essential. It is therefore necessary that the Legislature should make it obligatory on the Executive to act in consultation with other persons who

may not have that bias so that action may be taken after careful and balanced consideration. The freedom of the person is the right which has naturally been the most valued right of the citizen; and restrictions on it ranging from detention to minor restrictions on his movements have rightly evoked bitter comment and criticism. The greatest care is therefore necessary in the enactment of legislation giving the Executive powers restricting the liberty of the person. It is recognized that in a time of emergency it may be necessary forthwith to detain a person or impose restrictions on his movements. This necessity of immediate action itself makes it necessary that such power should be entrusted to the highest and most responsible officers. If it is essential to give such officers power to delegate their authority, it must be strictly circumscribed and restricted again to responsible and trusted subordinate officers. Provision should be made for the examination of the decision of the Executive by some authority of judicial experience in whom the public has confidence. Such an authority may be a judge of the Superior Courts or a Committee or Tribunal consisting of such judges. This tribunal should be entitled to have all the information submitted to it and should further have power to inform the person detained of the allegations against him and give him an opportunity of being heard after he has been furnished with such information. The functions of this tribunal should not be merely advisory, but its decision should be made binding on the Executive. The Legislature should also provide that persons detained for a certain length of time should be brought up for trial before the ordinary Courts, except in cases when a judicial tribunal considers this course undesirable in the public interest.

In regard to restrictions on the freedom of the press and the freedom of association, though the Executive may be empowered to take immediate action, it is essential that the orders passed by it should be open to examination in a summary inquiry in accordance with the principles of natural justice by a tribunal of judicial experience which should be

invested with powers to annul, revise or modify the decisions of the Executive.

Legislation in regard to invasion of rights as to property must similarly make provision for the acts of the Executive to be examined, and if necessary modified or reviewed, by proper tribunals. In the case of the requisition and acquisition of property, either for temporary or permanent purposes, it should not be difficult to have tribunals functioning in different local areas who would be competent to deal promptly and summarily with each case of requisition or acquisition. Orders passed by such tribunal would command the confidence of the public and prevent departmental appeals and attempts to take action in Courts of law. Tribunals dealing with these matters may have associated with them, apart from a judicial authority, a person or persons commanding confidence in the local areas concerned.

Measures for the regulation of trade by the Executive also require to be watched and controlled. In some cases the Executive constitute advisory bodies from the trade, whose views are from time to time elicited by the Executive in connexion with proposed measures of control. These bodies have no doubt helped to smooth over matters to a certain extent. But what is needed is not merely advisory bodies, but committees constituted by the trade or individuals selected from the trade who would be associated with the Executive in the matter of framing the control regulations. The knowledge needed for an effective regulation of the trade could only be obtained from men in the trade; and effective and proper regulation of the trade can be worked by the Executive only in collaboration with members of the trade.

It is essential even in emergency legislation to affect as little as possible the ordinary jurisdiction of the civil courts, particularly in matters relating to the freedom of the person of the citizen. Judicial decisions in times of emergency have shown that the Courts of law have been fully alive to the

needs of the emergency, and have construed emergency legislation in its true setting endeavouring in all cases to gather in it an intention and a meaning which would best serve the purpose of emergency. If therefore the citizen is not debarred from access to the Court, the consciousness in him that his right to have access to the ordinary courts of the land has not been taken away will inspire confidence in him in the acts of the Executive. At the same time the possibility of the acts of the Executive being examined by the courts with a view to see that they are within the terms of their charter and authority would act as a salutary check on the exercise of its powers by the Executive. The citizen's right to have recourse to the courts could therefore well be left to operate without affecting or defeating the true object of emergency legislation.

The Legislature should also be watchful of the protection and indemnity which it affords to the acts of the Executive done in the exercise of its powers. It is but just and right that that indemnity should extend to acts done *bona fide* in the exercise of its powers by the Executive. But it is manifestly unjust that it should extend to all acts done by it in the purported execution of its powers, whether they fall within the scope of the power or not, and whether they have been done in *bona fide* exercise of that power or not.

XXIII. CONCLUSION

The tests of freedom have been thus stated:—

> The essential aspects of democracy are the freedom of the individual, within the framework of laws passed by Parliament, to order his life as he pleases, and the uniform enforcement of tribunals independent of the Executive. These laws are based on Magna Carta, Habeas Corpus, the Petition of Right and others. Above all, they secure the freedom of the individual from arrest for crimes unknown to the law, and provide for a trial by jury of his equals. Without this foundation there can be no freedom or civilization, anyone being at the mercy of officials, and liable to be spied upon and betrayed even in his own

house. As long as these rights are defended the foundations of freedom are secure.[53]

No doubt, the vast increase of what may be called socialistic legislation and the interference of the State with many activities of the citizen have largely affected these fundamental values. The control of the State over the activities of the citizen, and regimentation and regulation by the State in a certain measure, even if it could be regarded as an evil, is inevitable. It is said, that we are moving towards the formation of a World State. The United Nations are said to be trying to put up an organization which it is hoped will be 'an expression of the will of the common people in every country.' It may be that these are but vain hopes and empty phrases. It, however, is obvious that we shall have regimentation and control of trade and production and various other activities throughout the world by bodies representing more than one nation. Every movement in that direction will necessarily mean a curtailment of the rights of the individual. It appears therefore that we are in the midst of a process which tends gradually to curtail in an ever increasing degree the liberty of the individual and to constitute him more and more a part of a vast organization regulated by forces beyond his control and in many cases beyond his comprehension. In the rising tide of socialistic and collectivistic opinion evidenced by labour and socialist governments coming into power in a number of countries all over the world, the voice of the individualist appears to be more and more a cry of the forlorn and the vanquished.

And yet democracy and freedom, the cries adopted by the Allied Nations in helping them to prosecute the war, necessarily postulate the freedom of the individual consistently no doubt with the rights of his fellow-citizen and the needs of his State. For democracy has been defined as 'a skilfully adjusted freedom of the individual to the maximum degree

53. Winston Churchill in a speech at Rome in August 1944, quoted in C. K. Allen, *Law and Orders*, p. 275.

in accord with orderliness and government.' And such freedom can only be founded in what has been called the Rule of Law. That Rule 'means a great deal more than fair and honest administration of justice in the courts; it conceives justice as a supreme human good and a self-sufficient end, and that conception affects the whole philosophy of life.'[54]

This Rule of Law can only be ensured by real power being maintained in the Legislature and by the Executive being entirely subordinated to it. Protection against the inroads of the Executive on the fundamental rights of the citizen can in some measure be secured by making these rights a part of the Constitution of the State, so that, if these rights are threatened or encroached upon, the citizen could always invoke the protection of the courts. And yet such safeguards contained in the Constitution or in the laws of the country, though helpful, can never be the real safeguards of the liberty of the citizen. As stated by Mr. Justice Felix Frankfurter:

> But neither the Court and counsel nor police and prosecution are the ultimate reliances for the liberties of the people. They rest in ourselves. The liberties that are defined by our Bill of Rights are, on the whole, more living realities in the daily lives of Englishmen without any formal constitution because they are part of the national habit, they are in the marrow of the bones of the people. Such habits become a national tradition through constant renewal in thought and in deed.[55]

It is only a perpetual and vigilant awareness in the citizen of his rights and a passionate desire to exercise them that can keep alive the individual liberties of the citizen in a world seething with forces having a tendency to encroach upon and engulf these rights. As was said by a distinguished Englishman:

> Laws and constitutions are but the paper safeguards of liberty. A people must have the will to be free.[56]

54. C. K. Allen, *Law and Orders*, pp. 277-278.
55. *Mr. Justice Holmes and the Supreme Court*, p. 63.
56. Sir Cecil Thomas Carr, *Concerning English Administrative Law*, p. 92.

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